United Nations

Report of the International Law Commission

on the work of its forty-fourth session

4 May–24 July 1992

General Assembly
Official Records • Forty-seventh Session
Supplement No. 10 (A/47/10)

Report of the International Law Commission on the work of its forty-fourth session

4 May–24 July 1992

General Assembly
Official Records • Forty-seventh Session
Supplement No. 10 (A/47/10)

United Nations • New York, 1992

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook . . . 1971*) indicates a reference to the *Yearbook of the International Law Commission.*

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 1992*.

ISSN 0082-822X

[Original: Arabic/Chinese/English/
French/Russian/Spanish]

[1 September 1992]

CONTENTS

Chapter			Paragraphs	Page
I.	INTRODUCTION		1 - 15	1
	A.	Membership	2	1
	B.	Officers	3 - 4	2
	C.	Drafting Committee	5	3
	D.	Working Groups established by the Commission	6 - 7	3
	E.	Secretariat	8	4
	F.	Agenda	9 - 10	4
	G.	General description of the work of the Commission at its forty-fourth session	11 - 14	5
	H.	Issues on which expressions of views by Governments would be of particular interest for the Commission for the continuation of its work	15	8
II.	DRAFT CODE OF CRIMES AGSINST THE PEACE AND SECURITY OF MANKIND		16 - 104	9
	A.	Introduction	16 - 23	9
	B.	Consideration of the topic at the present session	24 - 104	11
		1. The tenth report of the Special Rapporteur	25 - 97	12
		2. Working Group on the question of an international criminal jurisdiction	98 - 103	31
		3. Decision of the Commission	104	32

CONTENTS (continued)

Chapter | Paragraphs | Page

III. STATE RESPONSIBILITY .... 105 - 276 34

A. Introduction .... 105 - 111 34

B. Consideration of the topic at the present session .... 112 - 276 37

1. Comments on the topic as a whole .... 112 - 114 37

2. The draft articles contained in the preliminary and second reports of the Special Rapporteur .... 115 - 116 38

3. The third and fourth reports of the Special Rapporteur .... 117 - 276 39

(a) General approach to the question of countermeasures .... 121 - 138 39

(b) Elements relevant to the inclusion of a regime of countermeasures in the draft articles .... 139 - 250 47

(i) The notion of countermeasures: terminological and conceptual aspects .... 139 - 145 47

(ii) The various types of measures to be envisaged in the present context .... 146 - 152 49

(iii) Functions of countermeasures .... 153 - 156 52

(iv) The distinction between crimes and delicts in the context of countermeasures .... 157 - 159 53

(v) The relationship between the regulation of countermeasures and the proposed Part Three on settlement of disputes .... 160 - 163 53

(vi) Conditions for the legality of countermeasures .... 164 - 217 55

(vii) Prohibited countermeasures ...... 218 - 250 73

CONTENTS (continued)

Chapter	Paragraphs	Page
(c) The question of countermeasures in the context of articles 2, 4 and 5 of Part Two adopted on first reading at previous sessions of the Commission	251 - 276	86
(i) The question of self-contained regimes	251 - 259	86
(ii) The relationship between the draft under elaboration and the United Nations Charter.......	260 - 266	90
(iii) The question of differently injured States	267 - 276	93
IV. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW	277 - 349	100
A. Introduction	277 - 280	100
B. Consideration of the topic at the present session	281 - 349	102
1. The eighth report of the Special Rapporteur	281 - 284	102
(a) General comments	285 - 291	103
(b) The nature of the instrument to be drafted	292 - 294	106
(c) Prevention	295 - 302	107
(d) Comments on specific articles	303 - 333	110
(i) Article 1. Preventive measures .	303 - 307	110
(ii) Article 2. Notification and information	308 - 312	112

CONTENTS (continued)

Chapter		Paragraphs	Page
	(iii) Article 3. National security and industrial secrets	313 - 314	114
	(iv) Article 4. Activities with harmful effects: prior consultation ..	315 - 319	115
	(v) Article 5. Alternatives to an activity with harmful effects	320 - 322	117
	(vi) Article 6. Activities involving risk: consultations on a regime	323 - 324	118
	(vii) Article 7. Initiative by the affected States	325 - 327	119
	(viii) Article 8. Settlement of disputes	328 - 329	120
	(ix) Article 9. Factors involved in a balance of interests	330 - 333	121
	(e) Proposed new definitions for article 2 on the use of terms	334 - 340	123
	2. Decisions by the Commission	341 - 349	127
	(a) Scope of the topic	344 - 346	127
	(b) The approach to be taken with regard to the nature of the articles or of the instrument to be drafted	347	128
	(c) Title of the topic	348	128
	(d) Recommendation on the report of the Special Rapporteur for the next year	349	129

CONTENTS (continued)

Chapter	Paragraphs	Page
V. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION .	350 - 392	130
A. The law of the non-navigational uses of international watercourses	350 - 352	130
B. Draft Code of Crimes against the Peace and Security of Mankind	353 - 354	130
C. Relations between States and international organizations (second part of the topic)	355	131
D. Programme, procedures and working methods of the Commission, and its documentation	356 - 377	131
1. Planning of activities	359 - 367	132
(a) The topic "Relations between States and international organizations: (second part of the topic)"	359 - 362	132
(b) Planning of the activities for the quinquennium	363 - 367	133
2. Long-term programme of work	368 - 370	134
3. Drafting Committee	371 - 372	135
4. Report of the Commission to the General Assembly	373	136
5. Contribution of the Commission to the Decade of International Law	374 - 375	136
6. Possibility of dividing the Commission's annual session in two parts	376	137
7. Duration of the next session	377	138
E. Cooperation with other bodies	378 - 380	138
F. Date and place of the forty-fifth session	381	138
G. Representation at the forty-seventh session of the General Assembly	382	139
H. International Law Seminar	383 - 392	139

CONTENTS (continued)

Annex: Report of the Working Group on the question of an international criminal jurisdiction

	Paragraphs	Page
A. Summary and recommendations	393 - 401	143
B. *In extenso* report	402 - 557	148
1. Introduction	402 - 416	148
2. General arguments relating to an international criminal court	417 - 435	155
(a) The arguments for a court	419 - 424	155
(b) The arguments against a court	425 - 428	158
(c) Alternative possibilities	429 - 430	159
(d) The Working Group's general approach	431 - 435	160
3. Structural and jurisdictional issues	436 - 472	162
(a) The method of creation of a court	437	162
(b) The composition of a court	438 - 443	163
(c) The ways by which a State might accept the jurisdiction of a court	444 - 448	165
(d) The subject-matter jurisdiction (jurisdiction *ratione materiae*) of a court	449 - 451	166
(e) The personal jurisdiction (jurisdiction *ratione personae*) of a court	452 - 459	168
(f) The relationship between a court and the Code of Crimes	460 - 466	171
(g) Possible arrangements for the administration of a court	467 - 472	172
4. An international criminal trial mechanism other than a court	473 - 487	174

CONTENTS (continued)

	Paragraphs	Page
5. Applicable law, penalties and due process	488 - 503	179
(a) The applicable law	489 - 501	179
(i) The definition of crimes	492 - 494	180
(ii) The general rules of criminal law	495 - 499	181
(iii) Applicable procedure	500	182
(iv) Conclusion	501	183
(b) The penalties to be imposed	502	183
(c) Ensuring due process	503	184
6. Prosecution and related matters	504 - 557	184
(a) The system of prosecution	506 - 509	184
(b) The initiation of a case	510 - 517	185
(c) Bringing defendants before a court	518 - 527	187
(d) International judicial assistance in relation to proceedings before a court	528 - 545	190
(e) Implementation of sentences	546 - 549	195
(f) Relationship of a court to the existing extradition system	550 - 557	196
C. Appendix		199

CHAPTER I

INTRODUCTION

1. The International Law Commission established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its forty-fourth session at its permanent seat at the United Nations Office at Geneva, from 4 May to 24 July 1992.

A. Membership

2. The Commission consists of the following members:

Mr. Husain Al-Baharna (Bahrain)
Mr. Awn Al-Khasawneh (Jordan)
Mr. Gaetano Arangio-Ruiz (Italy)
Mr. Julio Barboza (Argentina)
Mr. Mohamed Bennouna (Morocco)
Mr. Derek William Bowett (United Kingdom)
Mr. Carlos Calero Rodrigues (Brazil)
Mr. James Crawford (Australia)
Mr. John de Saram (Sri Lanka)
Mr. Gudmundur Eiriksson (Iceland)
Mr. Salifou Fomba (Mali)
Mr. Mehmet Güney (Turkey)
Mr. Kamil Idris (Sudan)
Mr. Andreas Jacovides (Cyprus)
Mr. Peter Kabatsi (Uganda)
Mr. Abdul Koroma (Sierra Leone)
Mr. Mochtar Kusuma-Atmadja (Indonesia)
Mr. Ahmed Mahiou (Algeria)
Mr. Vaclav Mikulka (Czechoslovakia)
Mr. Guillaume Pambou-Tchivounda (Gabon)
Mr. Alain Pellet (France)
Mr. Pemmaraju Sreenivasa Rao (India)
Mr. Edilbert Razafindralambo (Madagascar)
Mr. Patrick Lipton Robinson (Jamaica)

Mr. Robert Rosenstock (United States)
Mr. Jiuyong Shi (China)
Mr. Alberto Szekely (Mexico)
Mr. Doudou Thiam (Senegal)
Mr. Christian Tomuschat (Germany)
Mr. Edmundo Vargas Carreño (Chile)
Mr. Vladlen Vereshchetin (Russian Federation)
Mr. Francisco Villagran Kramer (Guatemala)
Mr. Chusei Yamada (Japan)
Mr. Alexander Yankov (Bulgaria)

B. Officers

3. At its 2253rd meeting on 4 May 1992, the Commission elected the following officers:

Chairman:	Mr. Christian Tomuschat
First Vice-Chairman:	Mr. Carlos Calero Rodrigues
Second Vice-Chairman:	Mr. Andreas Jacovides
Chairman of the Drafting Committee	Mr. Alexander Yankov
Rapporteur:	Mr. Edilbert Razafindralambo

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as Chairman of the Commission, 1/ and the Special Rapporteurs. 2/ The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2254th meeting on 5 May 1992, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission and its documentation and to report thereon to the Enlarged Bureau. The Planning

---

1/ Namely, Mr. Abdul Koroma, Mr. Jiuyong Shi, Mr. Doudou Thiam and Mr. Alexander Yankov.

2/ Namely, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza and Mr. Doudou Thiam. Mr. Robert Rosenstock, having been appointed Special Rapporteur at the concluding stage of the session, did not take part in the meetings of the Enlarged Bureau.

Group was composed of the following members: Mr. Carlos Calero Rodrigues (Chairman), Mr. Awn Al-Khasawneh, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Mohamed Bennouna, Mr. Mehmet Güney, Mr. Kamil Idris, Mr. Andreas Jacovides, Mr. Peter Kabatsi, Mr. Mochtar Kusuma-Atmadja, Mr. Vaclav Mikulka, Mr. Guillaume Pambou-Tchivounda, Mr. Alain Pellet, Mr. Pemmaraju Sreenivasa Rao, Mr. Patrick Lipton Robinson, Mr. Doudou Thiam, Mr. Edmundo Vargas Carreño, and Mr. Chusei Yamada.

The group was open-ended and other members of the Commission were welcome to attend its meetings.

C. Drafting Committee

5. At its 2254th meeting, on 5 May 1992, the Commission appointed a Drafting Committee which was composed of the following members: Mr. Alexander Yankov (Chairman), Mr. Husain Al-Baharna, Mr. Derek William Bowett, Mr. Carlos Calero Rodrigues, Mr. James Crawford, Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Salifou Fomba, Mr. Ahmed Mahiou, Mr. Robert Rosenstock, Mr. Jiuyong Shi, Mr. Alberto Szekely, Mr. Vladlen Vereshchetin and Mr. Francisco Villagran Kramer.

D. Working Groups established by the Commission

6. At its 2262nd meeting, on 19 May 1992, the Commission established a Working Group on the question of an international criminal jurisdiction, to be considered pursuant to the invitation contained in paragraph 3 of General Assembly resolution 46/54, which was composed of the following members: Mr. Abdul Koroma (Chairman), Mr. Doudou Thiam *ex officio* (Special Rapporteur for the topic "Draft Code of Crimes against the Peace and Security of Mankind"), Mr. Husain Al-Baharna, Mr. Gaetano Arangio-Ruiz, Mr. James Crawford, Mr. John de Saram, Mr. Kamil Idris, Mr. Andreas Jacovides, Mr. Vaclav Mikulka, Mr. Alain Pellet, Mr. Patrick Lipton Robinson, Mr. Robert Rosenstock, Mr. Christian Tomuschat, Mr. Vladlen Vereshchetin and Mr. Francisco Villagran Kramer. Mr. Thiam acted as Chairman of the Working Group for several meetings, in Mr. Koroma's absence.

7. At its 2273rd meeting, on 16 June 1992, the Commission established a Working Group, open to any member who wished to participate, to consider some of the general issues relating to the scope, the approach to be taken, and the

possible direction of the future work on the topic "International liability for injurious consequences and of acts not prohibited by international law".

E. Secretariat

8. Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General.

Mr. Vladimir S. Kotliar, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Jacqueline Dauchy, Deputy Director of the Codification Division of the Office of Legal Affairs, acted as Deputy Secretary to the Commission. Mr. Manuel Rama-Montaldo, Senior Legal Officer, served as Senior Assistant Secretary to the Commission, and Ms. Mahnoush H. Arsanjani, Legal Officer, served as Assistant Secretary to the Commission.

F. Agenda

9. At its 2254th meeting, on 4 May 1992, the Commission adopted an agenda for its forty-fourth session, consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. Draft Code of Crimes against the Peace and Security of Mankind.
4. The law of the non-navigational uses of international watercourses.
5. International liability for injurious consequences arising out of acts not prohibited by international law.
6. Relations between States and international organizations (second part of the topic).
7. Programme, procedures and working methods of the Commission and its documentation.
8. Cooperation with other bodies.
9. Date and place of the forty-fifth session.
10. Other business.

10. The Commission, in view of its practice not to hold a substantive debate on draft articles adopted on first reading until the comments and observations of Governments thereon are available, did not consider the item "The law of the non-navigational uses of international watercourses", nor draft articles under the item "Draft Code of Crimes against the Peace and Security of

Mankind", pending receipt of the comments and observations which Governments have been invited to submit by 1 January 1993 on the sets of draft articles provisionally adopted by the Commission at its forty-third session on the two topics in question. As regards the latter item, however, the Commission, in accordance with the invitation contained in paragraph 3 of General Assembly resolution 46/54, considered further and analysed the issues raised in its 1990 report 3/ concerning the question of an international criminal jurisidiction. The Commission did not consider the item "Relations between States and international organizations (second part of the topic) and draws attention in this respect to the decision reflected in paragraph 355 below. The Commission held 42 public meetings (2253rd to 2294th) and, in addition, the Drafting Committee of the Commission held 27 meetings, the Enlarged Bureau of the Commission held three meetings and the Planning Group of the Enlarged Bureau held 11 meetings.

G. General description of the work of the Commission at its forty-fourth session

11. In the framework of the topic "Draft Code of Crimes against the Peace and Security of Mankind", 4/ the Commission considered the tenth report of the Special Rapporteur, Mr. Doudou Thiam, dealing with the question of an international criminal jurisdiction, and the report of the Working Group on this question, established by the Commission. 5/ The Commission decided, *inter alia*, that through the examination of the Special Rapporteur's ninth 6/ and tenth reports and through the report of the Working Group 7/ it had

---

3/ *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10* (A/45/10).

4/ This topic was examined by the Commission at its 2254th to 2264th and 2284th to 2287th plenary meetings held between 5 and 22 May and between 14 and 17 July 1992.

5/ See para. 6 above.

6/ See *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10* (A/46/10), paras. 106 to 165.

7/ See Annex.

concluded the task of analysis of "the question of establishing an international criminal court or other international criminal trial mechanism", entrusted to it by the General Assembly in 1989; that a structure along the lines suggested in the Working Group's report could be a workable system; that further work on the issue required a renewed mandate from the Assembly to draft a statute; and that it was now for the Assembly to decide whether the Commission should undertake the project for an international criminal jurisdiction, and on what basis. The structure suggested in the Working Group's report consisted, in essence, of an international criminal court established by a statute in the form of a treaty agreed to by States parties which, in the first phase of its operations, at least, should exercise jurisdiction only over private persons. Its jurisdiction should be limited to crimes of an international character defined in specified international treaties in force, which includes the crimes defined in the draft Code of Crimes against the Peace and Security of Mankind upon its adoption and entry into force, but is not limited thereto. A State should be able to become a party to the statute without thereby becoming a party to the Code. The court would be a facility for States parties to its statute (and also, on defined terms, to other States) which could be called into operation when and as soon as required and which, in the first phase of its operation, at least, should not have compulsory jurisdiction and would not be a standing full-time body. Furthermore, whatever the precise structure of the court or other mechanisms (which also were suggested and considered), it must guarantee due process, independence and impartiality in its procedures. 8/

12. The Commission considered the topic "State responsibility" 9/ on the basis of the third and fourth reports of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz (A/CN.4/L.440 and Add.1 and A/CN.4/L.444 and Corr.1 and Add.1, 2 and 3) which were mainly devoted to the question of

---

8/ For an account of the treatment of the topic at the present session, see chapter II.

9/ The topic was examined at the 2265th, 2266th, 2267th, 2273rd to 2280th and 2283rd meetings held between 26 May and 12 July 1992.

countermeasures and contained four articles, namely article 11 (Countermeasures by an injured State), article 12 (Conditions of resort to countermeasures), article 13 (Proportionality) and article 14 (Prohibited countermeasures) as well as a new article 5 bis relating to the case of a plurality of injured States. At the conclusion of its debate, the Commission agreed to refer all the above-mentioned articles to the Drafting Committee. The Commission further received from the Drafting Committee a report (A/CN.4/L.472) which contained a new paragraph 2 to article 1 of Part Two, as well as article 6 (Cessation of wrongful conduct), article 6 bis (Reparation), article 7 (Restitution in kind), article 8 (Compensation), article 10 (Satisfaction) and article 10 bis (Assurances and guarantees of non-repetition), which had been adopted on first reading by the Drafting Committee at the current session. It took note of that report and decided to defer action on it until its next session for the reasons explained in para. 116 below. 10/

13. As regards the topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission considered the eighth report of the Special Rapporteur, Mr. Julio Barboza (A/CN.4/443 and Corr.1 and Corr.2 (Spanish only)). 11/ In that report, the Special Rapporteur proposed nine draft articles on the obligations of preventing transboundary harm. These articles were proposed to be of a recommendatory nature and be placed in an annex. The eighth report also made further proposals on some of the terms used in article 2, such as the concepts of risk and harm. At the conclusion of the consideration of the topic, the Commission, due to uncertainties remaining among members of the Commission on some general issues, established the Working Group referred to in para. 7 above to examine certain general matters relating to the scope, the approach to be taken, and the possible direction of the future work of the topic. On

---

10/ For an account of the treatment of the topic at the current session, see chapter III.

11/ This topic was considered at the 2286th to 2273rd and 2282nd meetings, held between 12 to 23 June and on 8 July 1992.

the basis of the recommendations of the Working Group, the Commission adopted certain decisions (see paras. 341 to 349 below) among which it requested that the Special Rapporteur, in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect. 12/

14. Matters relating to the programme, procedures and working methods of the Commission were discussed in the framework of the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant decisions of the Commission are to be found in chapter I of the report which also deals with cooperation with other bodies and with certain administrative and other matters.

H. Issues on which expressions of views by Governments would be of particular interest for the Commission for the continuation of its work

15. With respect to the topic "Draft Code of Crimes against the Peace and Security of Mankind" the Commission, as follows from its decision on the topic, 13/ requests a clear indication by Governments if it should now embark on the elaboration of a draft Statute of an International Criminal Court and, if so, whether the Commission's work on the matter should proceed on the basis indicated in that decision.

12/ For an account of the treatment of the topic at the current session, see chapter IV.

13/ See para. 104 below.

CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

16. The General Assembly, in resolution 177 (II) of 21 November 1947, directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; and (b) prepare a draft Code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission, at its first session in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

17. On the basis of the reports of the Special Rapporteur, the Commission: (a) at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session, in 1954, submitted a draft Code of offences against the peace and security of mankind, with commentaries, to the General Assembly. 14/

18. The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code of offences against the peace and security of mankind as formulated by the Commission raised problems closely related to those of the definition of aggression, and that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft Code until the Special Committee had submitted its report.

19. On the basis of the recommendation of the Special Committee, the General Assembly, in resolution 3314 (XXIX) of 14 December 1974, adopted the Definition of Aggression by consensus.

14/ Yearbook ... 1950, vol. II, pp. 374-378, document A/1316. Yearbook ... 1954, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also Yearbook ... 1985, vol. II (Part Two), pp. 12 and 8, document A/40/10, paras. 45 and 18.

20. On 10 December 1981, the General Assembly, in resolution 36/106, invited the Commission to resume its work with a view to elaborating the draft Code of offences against the peace and security of mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. 15/

21. The Commission, at its thirty-fourth session, in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. 16/ The Commission, from its thirty-fifth session, in 1983, to its forty-third session, in 1991, received nine reports from the Special Rapporteur. 17/

22. At its forty-third session, in 1991, the Commission provisionally adopted on first reading the draft articles of the draft Code of crimes against the peace and security of mankind. 18/ At the same session, the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations

---

15/ In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English to read "Draft Code of Crimes against the Peace and Security of Mankind".

16/ For a detailed discussion of the historical background of this topic, see the Report of the International Law Commission on the work of its thirty-fifth session (*Official Records of the General Assembly, Thirty-eighth session, Supplement No. 10*, (A/38/10)), paras. 26 to 41.

17/ *Yearbook ... 1983*, vol. II (Part One), p. 137, document A/CN.4/364; *Yearbook ... 1984*, vol. II (Part One), p. 89, document A/CN.4/377; *Yearbook ... 1985*, vol. II (Part One), document A/CN.4/387; *Yearbook ... 1986*, vol. II, document A/CN.4/398; *Yearbook ... 1987*, vol. II (Part One), document A/CN.4/404; *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/411; *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/419 and Add.1 and Corr.1 and 2 (Spanish only); *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/430 and Add.1; *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/435 and Add.1 and Corr.1.

18/ See *Official Records of the General Assembly, Forty-sixth session, Supplement No. 10* (A/46/10), para. 173.

should be submitted to the Secretary-General by 1 January 1993. 19/ The Commission also noted that the draft that it had completed on the first reading constituted the first part of the Commission's work on the topic of the draft Code of Crimes against the Peace and Security of Mankind and that the Commission would continue at forthcoming sessions to fulfil the mandate the General Assembly assigned to it in paragraph 3 of resolution 45/41, of 28 November 1990, which invited the Commission, in its work on the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. 20/

23. By its resolution 46/54 of 9 December 1991, on the Report of the International Law Commission on the work of its forty-third session, the General Assembly invited the Commission, within the framework of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its 1990 report 21/ concerning the question of international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter.

B. Consideration of the topic at the present session

24. At the present session, the Commission had before it the Special Rapporteur's tenth report on the topic (A/CN.4/442). The Commission considered the report at its 2254th to 2264th meetings held between 5 to 22 May 1992. A summary of the debate is contained in paragraphs 25 to 97 of

---

19/ Ibid., para. 174.

20/ Ibid., para. 175. The Commission noted that it had already started to discharge this mandate and its work on this aspect of the topic was reflected in paras. 106 to 165 of its report (ibid.).

21/ Official Records of the General Assembly, Forty-fifth session, Supplement No. 10 (A/45/10), chap. I2, sect. C.

the report. Following the discussion, the Commission established a Working Group to consider the question of an international criminal jurisdiction. An account of the Working Group's constitution and work is found in paragraphs 98 to 103 below. 22/ The decisions of the Commission on its future work on this question are contained in paragraph 104 of the report.

1. The tenth report of the Special Rapporteur

25. The Special Rapporteur devoted his tenth report entirely to the question of the possible establishment of an international criminal jurisdiction. He noted both in the introduction to his tenth report as well as in his presentation of his report to the Commission that the Assembly had not yet asked the Commission to draft a statute for a possible international criminal court or other international trial mechanism but only "to consider further and analyse the issues" related thereto. Consequently, the Special Rapporteur, further to discussing in his report the general question of the feasibility of establishing an international criminal jurisdiction, also went on to identify certain issues of particular relevance in connection with the establishment of such a jurisdiction and prepared some prospective or tentative draft provisions on these issues, not with a view to their being referred to the Drafting Committee but rather in order to elicit and facilitate an in-depth discussion in the Commission, which might pemit the Commission to reach certain conclusions or recommendations addressed to the General Assembly.

26. In the first part of his report, the Special Rapporteur examined certain reservations or objections raised by some States, in United Nations forums or within their own domestic agencies, regarding the possible establishment of such a court, reservations or objections which have to do either with the desirability or feasibility of establishing such a court, given the current international situation, or with the compatibility between such a court and domestic legal provisions of States. In his report, the Special Rapporteur endeavoured to respond to each of those reservations or objections. In the end, he drew the general conclusion that behind many of them there was an

---

22/ The report of the Working Group is annexed to the report of the Commission.

apparent failure to take into account the existence of a very wide range of possible solutions or options with regard to the various aspects involved in the establishment of an international criminal court, solutions or options which could ease the concern raised in several States. In this connection, the Special Rapporteur went on to identify in Part B of his tenth report the following issues which, in his view, were specially important in considering the possible establishment of an international criminal jurisdiction:

A. The law to be applied; B. Jurisdiction of the court *ratione materiae*; C. Complaints before the Court; D. Proceedings relating to compensation; E. Handing over the subject of criminal proceedings to the court; and F. The court and the double hearing principle.

27. Some of the above-mentioned issues he had already broached in his ninth report 23/ and he was now presenting new options in the light of the discussion thereon which had taken place at the preceding session of the Commission. 24/ Some other issues he was raising for the first time. With regard to all those issues, his considerations took the form partly of commentaries, partly of exploratory and tentative draft provisions, not intended to be referred to the Drafting Committee but only, at this stage, to elicit the reaction of the Commission's members with regard to those issues and, possibly, to overcome the resistance that the idea of the possible establishment of an international criminal jurisdiction might arouse in some, by showing the great flexibility which was inherent in the various possible options or alternatives which he presented with regard to these issues.

28. A discussion ensued in Plenary as regards Parts A and B of the Special Rapporteur's report whose main ideas will be briefly summarized below.

29. The question whether the establishment of an international criminal jurisdiction was feasible or desirable was addressed. Many members felt that the lack of an international organ charged with the prosecution and trial of

---

23/ Document A/CN.4/435/Add.1.

24/ *Official Records of the General Assembly, Forty-sixth session, Supplement No. 10* (A/46/10), paras. 106 to 165.

crimes of an international character, which affected the international community as a whole, constituted a gap to be filled in present-day international relations. In these members' view recent events on the international scene had clearly shown that the existence of such an organ could have provided a smooth way out of situations susceptible of leading to international friction. Some members stressed that in certain cases, national courts both in the State where the accused was found and in the injured State could be suspected of being partial. They also felt that an international criminal jurisdiction would provide the most objective and uniform implementation of the Code of crimes against the peace and security of mankind. These members also viewed the recent changes in the international situation as favouring the prospects that the establishment of an international criminal jurisdiction might gather enough support in the international community. To some of these members, it was inconceivable that the implementation of the draft Code and, in particular, the prosecution of some crimes therein contained, such as aggression and other crimes in which agents of the State were the perpetrators, could be left to national tribunals. These members could not conceive of a Code of crimes against the peace and security of mankind without being accompanied by an international criminal jurisdiction.

30. Some other members, without denying the advantages that some kind of an international criminal jurisdiction might have in certain international situations, and with regard to certain international crimes, stressed the great political and technical complexities that the creation of such an organ might entail. In their view, it was not so much a question of whether an international criminal jurisdiction was desirable, but rather what type of an international jurisdiction was realistically feasible. And in order to do so, some members cautioned against the temptation of drawing too much on models from internal criminal codes. In the view of some members, flexibility in any approach to this question was of the essence. Some of these members felt that international trial mechanisms other than a court might be more realistic in the present-day international situation. They mentioned, *inter alia*, the following: observers in proceedings before national courts; an international

mechanism stating simply the law and national tribunals conducting the trial; ad hoc tribunals which could be called into being as necessary; advisory opinions of the International Court of Justice; regional tribunals.

31. Some members were sceptical of the feasibility of the very idea of the establishment of an international criminal jurisdiction. Although such an establishment might be desirable from an ideal point of view, it would, in these members' view, run into unsurmountable obstacles. Some of them expressed the view that it was almost inconceivable that States might be willing to surrender their sovereignty in order to create an international criminal jurisdiction. The special conditions which had existed at the end of the Second World War, which had made possible the creation of the Nürnberg and Tokyo Tribunals, no longer existed. The question was one of the relationship between international law and internal law. On the one hand, the establishment of an international criminal court would inevitably have repercussions on the constitutional order of some States. On the other hand, the principle "try or extradite" had been distilled by the existing international order and any modification of it would be tantamount to modifying the international order. In these members' view, this was an area in which law and politics were particularly intermingled, and politics seemed to be clearly showing that the mechanism proposed in this area was unrealistic.

32. One member stressed that, whatever the difficulties to establish an international criminal court and related institutions, those difficulties would not be any greater - and probably much less - than the difficulties on the way to the adoption by States of a Code of Crimes against the Peace and Security of Mankind and to the implementation of such a Code by a plurality of institutions operating under more than 175 distinct sovereignties.

33. As regards the structure of a possible international criminal court, most members believed that the most realistic approach was a flexible one, which would create not a permanent in the sense of a full-time body, but rather a permanent mechanism which could be convened immediately and without delay, when needed. It would be ad hoc not in the sense of an organ created ex-post facto but rather in the sense of a pre-existing mechanism which would be convened when the need arose, the composition of which would be determined, in each specific case, through objective criteria which would ensure the

impartiality of the judges. In these members' view, the international community was not yet prepared to have an international criminal court as a standing body along the lines of the International Court of Justice.

34. Some members, however, believed that the character of permanence was inherent in the concept of a court or at least a criminal court, as it would, *inter alia*, ensure the complete dedication of the judges to their function which, in its turn, would contribute to their objectivity and impartiality.

35. As regards the jurisdiction of the court, three issues were mainly discussed, namely the questions whether: (a) it should be binding or optional, (b) whether it should be exclusive, concurrent or of a review character, and (c) whether it should or not be linked to the Code.

36. On the question whether the jurisdiction should be established on a compulsory or on an optional basis, most members favoured a flexible regime whereby the ratification or accession to the court's statute would not *ipso facto* imply acceptance of the court's jurisdiction with regard to any crime. These members were in favour of a system whereby States would be left free to specify which of the crimes covered by the Code, or by other international conventions, they would accept as being crimes under the jurisdiction of the court. States would make their decision known either at the time of the signature of the statute of the court or later on, on an ad hoc basis.

37. Some members drew distinctions: the court could have compulsory jurisdiction with regard to certain crimes and optional jurisdiction with regard to others. Thus, in one member's view, the jurisdiction should be compulsory with regard to crimes against the peace and security of mankind and optional with regard to other crimes of an international character under existing conventions, such as the seizure of aircraft. Refining this concept, another member pointed out that for the jurisdiction of the court to be compulsory the crimes would have to be serious, fundamental and genuinely prejudicial to the dignity of mankind as a whole. In other words, when, behind the accused, it was in fact the State that was being tried, it would be reasonable to provide for the compulsory jurisdiction of the court.

38. Some other members, however, felt that there could be no question of optional jurisdiction or of the conferment of ad hoc jurisdiction. States

parties to the instrument establishing the court were bound to accept its jurisdiction over the crimes defined in the instruments referred to in its statute. According to these members, criminal law had to be strict and, if States were not ready to accept that, they should not become parties to the statute of the court.

39. Another aspect discussed with regard to the jurisdiction of a possible international criminal court was whether this should be exclusive, concurrent with national tribunals or of a review character.

40. Several members who advocated the optional character of the court's jurisdiction were also in favour of a jurisdiction which would be concurrent with that of national tribunals. In their view, it would be virtually impossible to divest national courts of the jurisdiction they already had under existing conventions and general international law. National courts would also retain their powers in respect of the acts or situations provided for in their domestic legislation.

41. Some other members felt that the proposed court could have exclusive jurisdiction on certain international crimes and concurrent jurisdiction with national tribunals on other crimes. This view had been expressed by the Special Rapporteur in his tenth report. However, not all of these members agreed on which crimes should fall under one category and which under the other. Thus, the Special Rapporteur had suggested that a court might have exclusive jursidiction over the crimes of genocide, systematic or mass violations of human rights, apartheid, illicit international trafficking in drugs, seizure of aircraft and kidnapping of diplomats or internationally protected persons. Other members, however, did not entirely agree with this list. Thus one view held that it did not refer to crimes such as aggression, threat of aggression, intervention and colonialism, which were usually committed by agents or representatives of States and should logically come under the exclusive jurisdiction of an international court. In another view, the exclusive jurisdiction could apply to crimes of an enormous gravity such as genocide but not to others such as illicit international trafficking in drugs or seizure of aircraft which would normally come under the competence of national tribunals.

42. These differences of view as to how to define the two categories of crimes led several members to express serious doubts about the advisability of creating a dual system of jurisdiction.

43. On the other hand, it was generally felt that a court endowed with a jurisdiction of a review character was not realistic, since it was difficult to expect that States might divest themselves of their national sovereignty in criminal matters to the point of accepting that the decisions of their own national tribunals might be subject to review by an international court.

44. The question of the jurisdiction ratione materiae of the court revolved mainly around the question whether it should be confined to the crimes defined in the draft Code of Crimes, or whether it should also cover crimes defined in some other international conventions. This, in turn, also raised the question of the relationship between an international criminal court and the draft Code of Crimes against the peace and security of mankind.

45. Some members had reservations about establishing any link between an international criminal court and the draft Code of Crimes because they had their own reservations concerning the broad scope of the Code as drafted on first reading. They had doubts as to the acceptability of the draft Code as presently drafted to many States and establishing any links between the Code and the court which might have the undesirable effect of preventing a possible court from ever coming into effect with regard to some international crimes defined in international conventions which were already in force.

46. Some other members, however, felt that this risk would be avoided if States could accept the court's jurisdiction with regard to some but not all the crimes in the Code.

47. Several members stressed that there could not be a Code of crimes against the peace and security of mankind unless there was an international criminal jurisdiction to administer it, and consequently the draft Code of Crimes should naturally come under the court's jurisdiction. This did not mean however that the court's jurisdiction could not also cover some international crimes provided in international conventions in force.

48. It was suggested in this connection that the Commission might prepare two provisions, the first relating to the jurisdiction of the court in the early stages of its existence prior to the adoption of a Code and the second

applicable once the Code became part of international law. Under the first, more modest draft provision, the court's jurisdiction would be confined to crimes recognized as such under existing international conventions, the court serving as an additional guarantee that such crimes would not remain unpunished. Under the second draft provision, the court would have jurisdiction in respect of crimes defined in the Code.

49. In this connection, many members also stressed that the court's statute and the draft Code should constitute separate instruments and that a State should be able to become a party to the court's statute without thereby becoming a party to the Code, and remain free to confer jurisdiction to the court with regard to certain crimes defined in international conventions.

50. Some members felt that a State should not be able to ratify the draft Code without thereby accepting the court's jurisdiction.

51. Two other issues were raised in respect of the jurisdiction of the criminal court; first, who can bring a complaint before the court; and secondly, the consent of which State or States would be required in order to confer jurisdiction on the court in respect of an individual who is charged with a crime.

52. As regards the first issue, it was noted that while it was useful to draw on the practice of bringing criminal proceedings in domestic law, it would be better not to transpose certain notions of internal law into international law. In the internal law of some systems, the formal right to institute proceedings before the court was normally vested in a public official such as the Prosecutor-General or Attorney-General. That official was empowered to decide, on the basis of the evidence produced, whether or not proceedings should be instituted. If such an institution were to be created for the court, the Prosecutor's Office should not, at least while the court was still at an early stage of its existence, be authorized to take the decision to prosecute unilaterally. The comment was made that if the Commission were to follow the civil law model and look to an independent institution empowered to prosecute, it might run into a great deal of difficulties related to costs, if the institutions were to be permanent, as well as to the problems involved in transposing to the international plane the enormous role such institutions played in the civil law system. According to this view, it might be better to

follow the common law system and recognize the prosecutor not as a quasi-independent body seeking the truth, but as an adversary committed to presenting one side of the case in a crucible of controversy out of which the truth would emerge.

53. Considering the difficulties in establishing an Office of a Prosecutor-General, a view was expressed that it might be better to envisage a kind of popular right of action whereby any State could bring a case before the court. Some members did not agree with this view. They did not believe that the international community was prepared for an actio popularis, even for the most serious crimes, since that would open the door to excesses.

54. Many members agreed that the States parties to the statute of the court should have the right to institute proceedings before the court. In the opinion of these members, limiting the right to institute proceedings to those States which had become party to the statute of the court did not prevent any other State or organization from submitting evidence for the purposes of indictment or trial of an individual alleged of having committed a crime.

55. Some members also suggested that the Commission could also consider adopting a provision similar to that of Article 35 of the Statute of the International Court of Justice to the effect that, under certain conditions, a non-party State might be authorized to have recourse to the court.

56. Some members referred to the question of which States might have the right to bring a specific case before the court.

57. A view was expressed that because the court would have jurisdiction over crimes such as aggression, threat of aggression, intervention and colonialism, it was impossible to agree with the view that any State should have the right to bring complaints before the court. Another view was also expressed that only the State in whose territory the crime was committed should be able to bring a case.

58. As regards the right of intergovernmental organizations to institute proceedings views differed.

59. Some members were of the view that some intergovernmental organizations should be given the right to institute proceedings before the court. According to this view, this might be useful, because in certain circumstances States might hesitate to bring a case to the court, for political reasons.

60. Some other members disagreed with the possibility of providing access to the court to intergovernmental organizations. They pointed out that in addition to the complex question of which organization should be given the right to institute proceedings before the court, there were other difficulties. Such access to the court by intergovernmental organizations would make it difficult to reconcile the international criminal trial mechanism with universal jurisdiction as already provided for by many international conventions. It would be unlikely that States would accept the jurisdiction of the court if intergovernmental organizations were also entitled to intervene. In particular, it was unclear how an intergovernmental organization could comply with some of the obligations that would be established, such as that of handing over suspects. *It was also noted that it was unnecessary to grant such access to the court by intergovernmental organizations where their individual members had already been given the right to institute proceedings before the court.

61. Yet, some members, while supporting the view that international organizations should not be given such access to the court, made an exception with respect to the Security Council of the United Nations. In their view, since the Security Council had the competence to determine the existence of an act of aggression or threat to or breach of the peace, and the competence to take necessary measures to restore international peace and security, it should be entitled to bring complaints before the court. The decision of the court would not interfere with the function of the Security Council because the latter would bring a case before the court in respect of an individual, for example an official of a State, only after it had already determined that that State had committed an act of aggression. These members agreed that the Security Council's action could be paralysed by the right of veto, but did not think that possibility was sufficient to deny the Council the right of bringing a complaint before the court. 25/

25/ Discussion on the relation between the Security Council and the international criminal court is contained in paragraphs 81 to 87 below.

60. Some other members disagreed with the possibility of providing access to the court to intergovernmental organizations. They pointed out that in addition to the complex question of which organization should be given the right to institute proceedings before the court, there were other difficulties. Such access to the court by intergovernmental organizations would make it difficult to reconcile the international criminal trial mechanism with universal jurisdiction as already provided for by many international conventions. It would be unlikely that States would accept the jurisdiction of the court if intergovernmental organizations were also entitled to intervene. In particular, it was unclear how an intergovernmental organization could comply with some of the obligations that would be established, such as that of handing over suspects. It was also noted that it was unnecessary to grant such access to the court by intergovernmental organizations where their individual members had already been given the right to institute proceedings before the court.

61. Yet, some members, while supporting the view that international organizations should not be given such access to the court, made an exception with respect to the Security Council of the United Nations. In their view, since the Security Council had the competence to determine the existence of an act of aggression or threat to or breach of the peace, and the competence to take necessary measures to restore international peace and security, it should be entitled to bring complaints before the court. The decision of the court would not interfere with the function of the Security Council because the latter would bring a case before the court in respect of an individual, for example an official of a State, only after it had already determined that that State had committed an act of aggression. These members agreed that the Security Council's action could be paralysed by the right of veto, but did not think that possibility was sufficient to deny the Council the right of bringing a complaint before the court. 25/

25/ Discussion on the relation between the Security Council and the international criminal court is contained in paragraphs 81 to 87 below.

66. Another view pointed out the relevance for this issue of the traditional rule whereby a State could, in the case of its own nationals, decline jurisdiction - in the event, in favour of the international criminal court - provided that there was an international element to the case. In the case of foreign nationals, however, the traditional rules concerning the determination of jurisdiction - with regard to extradition, for instance - would have to be radically modified bearing in mind that the court would have to try crimes that were an affront to the conscience of mankind. It would therefore be preferable not to have to secure the consent of the State in the territory of which the crime had been committed, for, otherwise, persons who committed atrocities in their own country might avoid all responsibility. It was noted that for certain crimes, the traditional rules of international criminal law should be considerably changed and an automatic though not exclusive jurisdiction should be conferred upon the court. In this respect certain procedural safeguards could be envisaged, such as for example, the requirement that an action be instituted at the request of three States or a committee of the General Assembly. In other cases the ordinary rule of jurisdiction might suffice. Other matters such as the possible immunity of the individual charged with a crime would also have to be addressed.

67. With respect to the jurisdiction ratione personae it was noted that the question was dealt with by the Special Rapporteur only from the limited angle of jurisdiction ratione loci and the question of ratione temporis was not yet considered. It was also stated that a rule as to the compétence de la compétence should be included in the statute of the court as well as some machinery to prevent frivolous requests, which could be prejudicial to the court. It was further noted by a member that a system known as a "denuncia" which is distinct from a complaint may also be envisaged.

68. As regards the law to be applied by the court, attention was drawn to the need to distinguish between the rules applicable to the definition of the crimes and the rules governing the rights of the accused and the conduct of the trial.

69. With respect to the first set of rules, the prevailing view was that under the principle nullum crimen sine lege the source of applicable law should be limited to international conventions defining crimes under international law.

70. The view was however expressed that international custom was also a source of substantive law in the present context. By way of illustration mention was made of apartheid which was generally considered a crime against the peace and security of mankind, even by States which had not ratified the relevant Convention. Reference was also made to the fact that the Nurnberg and Tokyo Tribunals had had to rely on customary law.

71. Some members furthermore felt that repeated resolutions of the General Assembly had a role to play as a reflection of the opinio juris of the international community and that, if a grave offence not covered by any specific law was committed, the court should not allow the offence to go unpunished.

72. While this view was strongly opposed by several members, the remark was made that the role of the resolutions of international organizations should not be ignored. It was pointed out that the resolutions of the General Assembly could be of decisive importance in characterizing a crime and that although the court should not be obliged to yield before a negative conclusion of the Security Council as to the existence of an act of aggression, there was a strong presumption that a positive determination by the Council would be binding on the court.

73. Several members stressed that the primary source of substantive applicable law should be the Code of Crimes against the Peace and Security of Mankind. Some, referring to the possibility that crimes might be left out of the Code, felt that the statute should mention, in addition to the Code, the instruments which defined those crimes. Other members, in keeping with their general position on the relationship between the Code and the court held the view that the statute should list the crimes that would come under the jurisdiction of the court.

74. As regards the rules governing the rights of the accused and the conduct of the trial, the Special Rapporteur had suggested a formulation based on Article 38 of the Statute of the International Court of Justice. While some

members endorsed that approach, others questioned the advisability of drawing inspiration, in formulating a rule designed to be applied in criminal proceedings, from a provision which was concerned with inter-state disputes.

75. The Special Rapporteur's text referred first to international conventions relating to the prosecution and prevention of crimes under international law. This formulation was supported by some members but considered by others as too restrictive inasmuch as it left out international conventions relating to human rights, the right to life, torture, etc.

76. The Special Rapporteur's text then mentioned international custom. While some members concurred with the proposed provision, others felt that custom lacked the precision required in criminal law and that, furthermore, there was practically no international custom in criminal law that was not incorporated in international instruments.

77. As regards the reference in the Special Rapporteur's text to the general principles recognized by States, some members singled out the principle _nullum crimen sine lege, nulla poena sine lege_ and the double jeopardy rule. Doubts were however expressed on the need for the proposed provision which was viewed as superfluous inasmuch as any principle of criminal law recognized by the international community would qualify as a rule of customary international law.

78. The fourth element of the Special Rapporteur's suggestion, namely judicial decisions and doctrines of publicists, was supported by several members, some of them emphasizing that the elements in question were only subsidiary means for the determination of the rules of law. Other members deemed it unnecessary to mention those sources of law which could, in their view, be invoked under the heading of international custom or of the general principles of criminal law.

79. As for the fifth element, namely internal law, it was objected to by several members. Reference was made to the dictum of the Permanent Court of International Justice to the effect that from the standpoint of international law and of the Court which is its organ, municipal laws are merely facts 26/

26/ _Case Concerning German Interests in Polish Upper Silesia_, P.C.I.J., 1926, Ser. A, No. 7, p. 19.

and the Commission was urged not to state that an international court could apply internal law. It was also remarked that quite apart from the fact that in the present context, internal law would be no more than the reflection of international law, the proposed reference would lead to uncertainty and confusion.

80. Other members however observed that failing to incorporate internal law in some way would leave enormous gaps. Mention was made of the numerous conventions which depended on internal law to function properly. The remark was also made that, basically, a person could be prosecuted only if that person had broken a law by which that person was bound, namely a rule of internal law, which might be based on, and possibly meant to implement, international law: in such a case, it was stated, internal law was not just a fact but the legal basis without which there would be no legal proceedings.

81. Some members referred, incidentally, to the question of the relationship between an international criminal jurisdiction and the Security Council, particularly as regards certain crimes such as aggression or threat of aggression, a question which had been raised by the Special Rapporteur in his ninth report and which had been discussed extensively by the Commission at its previous session. 27/

82. The proposition that, if the Security Council made no finding, the court would be entirely free to act in its judicial capacity gathered a large measure of support.

83. However, if the Security Council concluded that there had been an act of aggression, for example, the question arose as to whether the court might be free to reach a contrary conclusion in proceedings before it. It was pointed out in this connection that arguments could be made for the court to be bound by the decision of the Security Council, since it was desirable that all United Nations organs should speak with one voice; a further advantage would be that the court would not have to delve into the complex facts of the case

---

27/ *Ibid.*, paras. 153-165.

in order to arrive at the same conclusion as the Council. But equally convincing arguments could be found against the idea of binding the court by a decision of the Security Council as, in principle, it was undesirable that a judicial organ should be bound by a decision emanating from a political organ.

84. Some members felt that a possible solution to the above-mentioned problem could perhaps be found if account was taken of the fact that the decision of the Security Council would relate only to the responsibility of the State concerned and would say nothing on the question of individual responsibility which would be a matter for the court alone to decide.

85. Some other members, however, felt that it was not so easy to separate acts of States and acts of individuals. According to this view, the court had to ensure that the Security Council had acted in conformity with the Charter of the United Nations and international law. Thus, even if the Security Council did not conclude that aggression had taken place, the court was not bound by that decision.

86. Some other members, however, pointed out that the United Nations Charter did not contemplate a system of judicial review for acts of the Security Council.

87. It was also pointed out that if it was the General Assembly which determined that a crime of aggression had been committed, then the situation would be different altogether since article 25 of the Charter would not have to be applied. The General Assembly's view would simply form part of the evidence which the court would have to take into account but by which it would not be bound.

88. As regards the question of proceedings relating to compensation, some members supported the suggestion by the Special Rapporteur that an international criminal court might deal both with the criminal trial of an accused person and with the issues of compensation arising therefrom. Thus, it was stressed that, under certain domestic legal systems, proceedings relating to compensation could be combined with criminal proceedings. Even some of the systems which had not originally allowed claims for compensation together with criminal proceedings were now embracing the idea in order to ensure that a victim was compensated by an individual who had caused him harm. That was particularly relevant in the case of grave and massive

violations of human rights in which individuals suffered serious injury. It was considered that serious thought should be given to the possibility of including a provision in the statute of the court on the compensation of victims of crimes. It was also pointed out that the example of the European Court of Human Rights and the Inter-American Court of Human Rights, which dealt with violations committed by States and the compensation of the victims, suggested that it might be possible for an international criminal court to rule in matters of compensation.

89. Many members expressed strong reservations about the possibility of intermingling strictly criminal proceedings against individuals and civil claims for damages. In their view, an international criminal court would find such a mixture difficult to handle. And in addition, in many cases large numbers of victims could be involved. Furthermore, they doubted that compensation for injuries suffered as a result of a crime referred to the court was within the scope of the mandate that the General Assembly had given the Commission. In these members' view, that mandate related to the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism. Whatever might be involved in those differing concepts, they all had one common feature, namely, proceedings leading to the punishment of convicted offenders, as opposed to proceedings leading to the payment of compensation.

90. In this connection, some members drew a clear distinction between the issue itself of the right to compensation arising from harm suffered from an international crime and the organ which should deal with this matter. They were in favour of the former but had strong doubts about an international criminal court tackling this question. They therefore suggested alternative solutions. Noting that the basic function of a criminal court should be the rendering of criminal justice, it was asked whether the question of compensation should not be managed quasi-judicially by a commission acting as a sub-organ of the court system. Some other members suggested that, while an international criminal court could deal with criminal jurisdictional matters, the International Court of Justice could deal with the questions of compensation.

91. This proposal, however, gave rise to some objections. It was felt that if the matter were referred to the International Court of Justice the latter would inevitably reconsider the whole range of evidence already examined by the international criminal court. There might even be a disparity in the findings of the two bodies. Other members pointed to the fact that, in accordance with Article 36, paragraph 2 (d), of the Statute of the International Court of Justice, only States could be parties to a case before the court. To this, some other members, as well as the Special Rapporteur, answered that (a) the accused party before the International Court of Justice would be a State for the so-called responsibility of the principal, which was in fact enshrined in the draft Code, since it provided that a State could be sued for compensation arising out of acts of its agents and (b) the applicant party before the International Court of Justice would also be a State acting on behalf of its national victims of a crime against the peace and security of mankind. Some members, however, doubted that the institution of "diplomatic protection" was applicable in international criminal matters.

92. Some other members were of the view that, placed in the terms of the paragraph above, the whole issue of compensation fell rather under the scope of the topic of State responsibility.

93. As regards the question of the handing over of the subject of criminal proceedings to the court, many members supported the suggestion by the Special Rapporteur that every State party to the statute should be required to hand over to the prosecuting authority of the court, at the request of the court, any alleged perpetrator of a crime coming within its jurisdiction. Several members also supported the proposition that the handing over of an alleged perpetrator of a crime to the prosecuting authority of the court was not an extradition since justice administered by the court could not be considered, by the parties to the statute, as justice emanating from a foreign court. It was also pointed out that it might be useful for States to distinguish between extradition and the act of turning the accused over to a court, thus eliminating the possibility that a State might refuse to extradite its own nationals. In this connection, it was hoped that the prosecutorial

system to be established would contain special guarantees so that the preliminary hearing normally required in extradition proceedings could be dispensed with.

94. On the other hand, some members drew attention to the fact that it was essential to ensure that the principle of fundamental justice was observed and the basic human rights of the accused respected. In this connection, it was asked whether a State, when handing over a person to the court, would be entitled to hold domestic proceedings to determine whether its own standards with regard to the protection of human rights and other matters had been met.

95. As regards the question of the "double-hearing principle" or two-tiered jurisdiction, many members supported a suggestion by the Special Rapporteur to the effect that the proposed court should be organized in such a manner so as to ensure that a first ruling by the court could be reviewed within the system of the court itself. They viewed it as a fundamental guarantee in any criminal proceeding which was also enshrined in article 14, paragraph 5, of the International Covenant on Civil and Political Rights laying down that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. This took account of the fact that no court was infallible and therefore appeal was an important guarantee. Several of these members stressed that the appeals body should be empowered to take into consideration all facts, evidence and other pertinent elements that might assist it in adopting a final decision. It was, however, felt that review might not necessarily entail a complete re-examination of the case and could be limited to a verification of the correctness of the proceedings. Such a system, which was that of the "pourvoi en cassation" in French law (application for judicial review), might perhaps, in this view, be more readily acceptable.

96. Some members advocated the adoption of a set of detailed rules on the appellate system. Several members, in particular, suggested that a case should be heard in the first instance by a chamber of the court, and appeal should lie to the plenary court. It might be possible to envisage a role for the International Court of Justice.

97. It was, in particular, stressed that the two-tiered jurisdiction should be applied rigorously, along the lines of article 14, paragraph 5 of the

Covenant, since the double-hearing provision would be meaningless unless two tiers of the judiciary were involved. In such a system, cases in first instance should be heard by junior, or associate, judges and appeals assigned exclusively to more senior judges sitting in banc. A system where judges at the same level of seniority within the hierarchy were called upon to review the decision of their peers could be seen as a travesty of justice in that it would call into question the reputation of the judges in first instance and, by extension, the credibility of judgements of the international criminal court itself.

2. Working Group on the question of an international criminal jurisdiction

98. At the end of the discussion on the Special Rapporteur's report, the Commission decided to set up a Working Group 28/ with the mandate to consider further and analyse the main issues raised in the Commission's report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international court or other international criminal trial mechanism. In so doing, the Working Group would take into account the issues raised by the Special Rapporteur in his ninth report (Part II) and tenth report, in the light of the discussions thereon held at the Commission's past and current session. The Working Group would also draft concrete recommendations with regard to the various issues which it would consider and analyse within the framework of its mandate.

99. The Working Group held 16 meetings in the course of which it elaborated a report to the Commission containing a summary with specific recommendations,

---

28/ The members of the Working Group were: Mr. Abdul G. Koroma (Chair); Mr. Doudou Thiam *ex officio* (Special Rapporteur on the topic "Draft Code of Crimes against the Peace and Security of Mankind"); Messrs. Hussain M. Al-Baharna, Gaetano Arangio-Ruiz, James R. Crawford, John de Saram, Kamil Idris, Andreas J. Jacovides, Vaclav Milulka, Alain Pellet, Patrick Lipton Robinson, Robert Rosenstock, Christian Tomuschat, Vladlen Vereshchetin and Francisco Villagrán Kramer. Mr. Thiam acted as Chair of the Working Group for several meetings, in Mr. Koroma's absence.

an _in extenso_ report examining and analysing a number of issues related to the possible establishment of an international criminal jurisdiction, as well as an appendix.

100. The Chairman of the Working Group presented its report at the 2284th meeting of the Commission on 14 July 1992 and the Commission considered the report at its 2284th to 2287th meetings held between 14 to 17 July 1992.

101. Members in general expressed great appreciation for the work of the Working Group which had been able, in a relatively short time, to produce a highly valuable document which analysed, with a great level of technical proficiency, the issues involved in the possible creation of an international criminal jurisdiction.

102. Appreciation was also expressed for the fact that the Working Group had been able to arrive at concrete recommendations reproduced in paragraph 396 of Part A of its report, which were based on what was perceived as the minimum common denominator possible to achieve consensus on further work on the question, a perception which was shared by many members of the Commission.

103. Some members, however, indicated that, in their view, the kind of court recommended by the Working Group was more in the nature of an _ad hoc_ mechanism than of a permanent court. They regretted this since, in their view, permanence was of the essence if an international court were to function on the basis of judges totally independent of other concerns except the administration of justice. Some of these members also regretted that the possible role that the International Court of Justice could play in criminal matters had not been sufficiently explored by the Working Group.

3. Decision of the Commission

104. At its 2286th meeting on 17 July 1992, the Commission decided to include the report of the Working Group as an annex to its report on the session [29] and accepted as a basis for its future work the propositions enumerated in paragraph 396 of Part A of the Working Group's report and the broad approach which is set out in the report. The Commission furthermore concluded:

---

[29] See Annex.

(a) that through the ninth and tenth reports of the Special Rapporteur on the topic "Draft Code of Crimes against the peace and Security of Mankind" and the debates thereon in plenary, and through the report of the Working Group, it had concluded the task of analysis of "the question of establishing an international criminal court or other international criminal trial mechanism", entrusted to it by the General Assembly in 1989;

(b) that the more detailed study in the Working Group's report confirmed the view, expressed earlier by the Commission, that a structure along the lines of that suggested in the Working Group's report could be a workable system;

(c) that further work on the issue required a renewed mandate from the Assembly, and needed to take the form not of still further general or exploratory studies, but of a detailed project, in the form of a draft statute; and

(d) that it was now a matter for the Assembly to decide whether the Commission should undertake the project for an international criminal jurisdiction, and on what basis.

CHAPTER III

STATE RESPONSIBILITY

A. Introduction

105. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic: "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation (mise en oeuvre) of international responsibility. 30/

106. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". 31/

107. The Commission, at its thirty-second session, also began the consideration of Part Two of the draft articles, on "the content, forms and degrees of international responsibility".

108. The Commission, from its thirty-second (1980) to its thirty-eighth sessions (1986), received seven reports from the Special Rapporteur, Mr. Willem Riphagen, 32/ with reference to Parts Two and Three of the draft articles. From that time on, the Commission assumed that a Part Three on the settlement of disputes and the implementation (mise en oeuvre) of international responsibility would be included in the draft articles. The

---

30/ Yearbook ... 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

31/ Yearbook ... 1980, vol. II (Part Two), pp. 26-63, document A/35/10, chap. III.

32/ For the seven reports of the Special Rapporteur, see
Yearbook ... 1980, vol. II (Part One), p. 107, document A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, document A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, document A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1;
Yearbook ... 1984, vol. II (Part One), p. 1, document A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, document A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, document A/CN.4/397; and Add. 1.

seventh report contained a section (which was neither introduced nor discussed at the Commission) on preparation of the second reading of Part One of the draft articles, concerning the written comments of Governments on 10 of the draft articles of Part One.

109. As of the conclusion of its thirty-eighth session, in 1986, the Commission had provisionally adopted draft articles 1 to 5 of Part Two. 33/

33/ The draft articles of Part Two provisionally adopted so far by the Commission are:

"Article 1

The international responsibility of a State which, pursuant to the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in the present Part.

"Article 2

Without prejudice to the provisions of articles 4 and [12], the provisions of this Part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

"Article 3

Without prejudice to the provisions of articles 4 and [12], the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present Part.

"Article 4

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

"Article 5

1. For the purposes of the present articles, 'injured State' means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the present articles, an internationally wrongful act of that State.

2. In particular, 'injured State' means:

Draft articles 6 to 16 of Part Two 34/ and draft articles 1 to 5 of Part Three

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, 'injured State' means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States."

34/ For the text of draft articles 6 to 16 of Part Two, see Yearbook ... 1985, vol. II (Part Two), p. 20, note 66. These articles were referred to the Drafting Committee at the thirty-seventh session in 1985, see ibid., para. 162.

and its Annex had been referred to the Drafting Committee. 35/

110. The Commission, at its thirty-ninth session in 1987, appointed Mr. Gaetano Arangio-Ruiz Special Rapporteur for the topic of State responsibility. 36/ The Commission received from the Special Rapporteur a preliminary report (A/CN.4/416 and Corr.1 (English only) and Corr.2, A/CN.4/416/Add.1 and Corr.1 (English only), Corr.2 and Corr.3 (Spanish only)) in 1988 and a second report (A/CN.4/425 and Corr. 1 (English only) and A/CN.4/425/Add.1 and Corr. 1 (English only)) in 1990. At its forty-first and forty-second sessions in 1989 and 1990, the Commission referred to the Drafting Committee draft articles 6, 7, 8, 9 and 10 of Chapter Two (Legal consequences deriving for an international delict) of Part Two of the draft articles. 37/

111. At its forty-third session, in 1991, the Commission received from the Special Rapporteur a third report (A/CN.4/440 and Add.1) of which it heard the presentation but which it could not consider for lack of time.

B. Consideration of the topic at the present session

1. Comments on the topic as a whole

112. The topic was generally recognized as central to the mainstream of contemporary international law and as deserving a high rank of priority. Due note was taken of the Special Rapporteur's intention to proceed in his work so as to enable the Commission to complete the first reading of the draft

---

35/ For the text of draft articles 1 to 5 of Part Three and its Annex, see *Yearbook ... 1986*, vol. II (Part Two), p. 35, note 86. The five articles of Part Three and its Annex were referred to the Drafting Committee at the thirty-eighth session, in 1986, see ibid., para. 63.

36/ *Yearbook ... 1987*, vol. II (Part Two), para. 220.

37/ For the text of articles 6 and 7, see Report of the International Law Commission on the work of its forty-first session (*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10* (A/44/10)), pp. 191-193, paras. 229 and 230, and for articles 8, 9 and 10 see Report of the International Law Commission on the work of its forty-second session (*Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10* (A/45/10)), notes 247, 262 and 263.

articles before the end of the current term of office of its members. The comment was made that the Commission should seek to complete a first reading of the topic, including necessary revisions and deletions in Part One, by the end of the current term of office.

113. Several members stressed that the completion of a final draft on State responsibility would be a major contribution to the Decade of International Law and the Commission was invited to take advantage of the favourable circumstances created by the disappearance of ideological confrontation and the birth of an international climate more propitious for consensus.

114. Emphasis was placed on the need to keep progress on State responsibility in step with progress on the draft Code of Crimes against the Peace and Security of Mankind, taking into account article 5 thereof. Attention was also drawn to the relationship between the topic of State responsibility and the topic "International liability for injurious consequences arising out of acts not prohibited by international law".

2. The draft articles contained in the preliminary and second reports of the Special Rapporteur

115. The Chairman of the Drafting Committee presented to the Commission at its 2288th meeting a report of the Committee (A/CN.4/L.472) concerning its work on the draft articles on State responsibility which were contained in the preliminary and second reports of the Special Rapporteur and which had been referred to the Committee at the forty-first and forty-second sessions of the Commission in 1989 and 1990. The Drafting Committee devoted 25 meetings to the consideration of those draft articles and succeeded in completing its work on them. It adopted on first reading a new paragraph 2 to be included in article 1, as well as articles 6 (Cessation), 6 *bis* (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction) and 10 *bis* (Assurances and guarantees of non-repetition).

116. In line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time, it will have before it the material required to enable it to take a decision on the proposed draft articles. At the present stage, the Commission merely took note of the report of the Drafting Committee.

3. The third and fourth reports of the Special Rapporteur

117. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/440 and Add.1) of which, as indicated above, it had heard the presentation at the previous session and to which it devoted its 2265th, 2266th and 2267th meetings. It also had before it the fourth report (A/CN.4/444 and Corr.1 and Add.1, 2 and 3) which was introduced at the 2273rd, 2275th and 2277th meetings and to which it devoted its 2273rd to 2280th and 2283rd meetings.

118. Both reports dealt with the "instrumental" consequences of an internationally wrongful act or "countermeasures", namely, in the words of the Special Rapporteur, with the legal regime of the measures that an injured State may take against a State having committed an internationally wrongful act and more specifically, in principle, with the measures applicable in the case of delicts.

119. After hearing the Special Rapporteur's presentation, the Commission considered draft articles 11 to 14 and article 5 *bis* contained in the fourth report and decided at its 2283rd meeting to refer them to the Drafting Committee. A few members reserved their position on the question of the inclusion, in the draft, of provisions on countermeasures.

120. The comments and observations of members of the Commission on the articles referred to above and on the question of countermeasures in general are reflected in paragraphs 121 to 276 below.

(a) General approach to the question of countermeasures

121. Summarizing the presentation of his third report which he had made at the previous session of the Commission, [38] the Special Rapporteur noted that the legal regime of countermeasures, which constituted the core of Part Two of the draft on State responsibility, was one of the most difficult subjects of the whole topic. He pointed out that, whereas, with regard to the substantive

---

[38] See the report of the Commission on the work of its forty-third session (*Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10* (A/46/10)), paras. 311-322.

consequences of a wrongful act, one could draw from domestic law analogies to deal with similar problems arising on the international plane, domestic law could not provide much assistance with respect to countermeasures. The other difficulty with the study of countermeasures was the absence, in the international community, of any institutionalized remedies to be put into motion against a State which committed an internationally wrongful act. Consequently, the injured States were bound to rely mainly, in so far as general international law was concerned, upon their own unilateral reactions; and in that respect, the Commission had to take the greatest care, in devising the conditions of lawful resort to such reactions, to ensure that the factual inequalities among States did not unduly operate to the advantage of the strong and rich over the weak and needy.

122. Countermeasures were generally recognized as a reflection of the imperfect structure of the international society which had not yet succeeded in establishing an effective centralized system of law enforcement. The remark was made in this context that the international community unfortunately still lacked such a system, even in matters pertaining to international peace and security, given the absence of guarantee of effective action by the United Nations Security Council, and that, in any event, most internationally wrongful acts fell outside the competence of the Council. At the same time, the developments of recent years were viewed as opening encouraging prospects for the further progress of the new approaches to international relations reflected in the Covenant of the League of Nations and confirmed by the United Nations Charter.

123. The question whether countermeasures had a place in the law on State responsibility gave rise to divergent views.

124. According to one view, the question was whether the Commission could view the forms of countermeasures covering well over a century of practice of some States as rules of international law and thus suitable for codification. This question was viewed as calling for a negative answer inasmuch as a regulation of countermeasures was not likely to genuinely protect the interests and the positions of all States and would therefore aggravate the present unjust state of affairs. Attention was drawn to the Special Rapporteur's remark that the powerful or rich countries could easily enjoy an advantage over the weak or

poor in the exercise of the means of redress in the form of reprisals or countermeasures, and the remark was made that injured States which took countermeasures were often themselves the wrongdoing States, while the States alleged to be in breach of their international obligations were themselves the victim of injustice. In fact, according to this view, reprisals or countermeasures were often the prerogative of the more powerful States and the impropriety of the concept of reprisals or countermeasures as part of general international law lay in the fact that it was the outcome of the relationship between powerful States and weak and small States in a period where these latter States were unable to assert their rights under international law. For that reason, it was stated, many small States regarded the concept of reprisals or countermeasures as synonymous with aggression or intervention, whether armed or unarmed. With reference to a strict regime of conditional countermeasures as conceived by the Special Rapporteur, the remark was made that such a regime would be in the interest of powerful States and to the disadvantage or even the detriment of weaker or smaller States, because the factual inequality rightly noted by the Special Rapporteur made it inconceivable that a weak State might effectively and in good faith take countermeasures against a powerful State in order to secure the fulfilment of obligations following an internationally wrongful act committed by that powerful State. The question was further raised whether countermeasures or reprisals were compatible with Article 2, paragraphs 3 and 4, and Article 33 of the United Nations Charter and modern international law, taking into account Article 103 of the Charter. According to this view, therefore, countermeasures had no place in the law on State responsibility and their inclusion in the draft, far from enhancing the acceptability of the draft, would be viewed by weak States as an attempt to legitimize uncertain and controversial concepts and by powerful States as a hindrance in playing the role of guardians of the law.

125. In addition to the United Nations Charter, the numerous General Assembly resolutions providing for non-intervention in both the external and internal affairs of States, including the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (General Assembly resolution 36/103) were mentioned in this context.

Attention was drawn to paragraph (k) of Section II of the Declaration which provided for the duty of a State not to adopt any multilateral or unilateral economic reprisal or blockade against another State, in violation of the Charter. The opinion was expressed that, since that prohibition had been proclaimed by the General Assembly in the exercise of the powers vested in it by the Charter, it had political weight which the Commission had to take into account. Attention was also drawn to article 19 of the Charter of the Organization of American States 39/ which expressly prohibited the use of reprisals, whether or not they involved the use of force.

126. The above arguments and a number of others were viewed by several members as inviting the Commission to take an extremely cautious approach to the regulation of countermeasures.

127. Attention was drawn in particular to the complexity of the problem. The remark was made in this connection that the ability of a State to resort to countermeasures was subject to a series of intricate conditions and that, while the issues involved were relatively uncomplicated where the structure of the applicable legal relationships was essentially bilateral, they became much more complex outside the bilateral framework, particularly if there was, within the structure of the applicable legal relationships, an institutional core providing for corrective measures or sanctions and dispute settlement procedures - in which case the further problem arose of determining whether resort could be had not merely to the procedures provided in the particular applicable regime but also to measures permissible under general international law. The question was therefore raised whether countermeasures would, in practice, be a sufficiently understood and clear procedure to be endorsed and recommended by the Commission as an accepted coercive legal procedure in inter-State relations in contemporary, and future, international law.

128. A second question which was raised in this context was whether there was a need for the Commission to prescribe that the injured State might in effect "take the law into its hands", in light of the genuine opportunities for redress which were provided by dispute settlement procedures, retortionary

---

39/ United Nations, Treaty Series, vol. 119, p. 3 and vol. 721, p. 323.

measures and diplomatic protestations. A third point was that the goal of the system of international law, which was, by definition, the establishment of the rule of law at the international plane, could not be helped by providing, in a codification work, for decentralized reactions to the breaches of rules. In this context, concern was expressed that the very concept of countermeasures seemed to be antithetical to some of the fundamental general principles on which the international legal community had come to rely, including the principle of sovereign equality of States, the principle of equality before the law and the principle of peaceful settlement of disputes. An additional reason which was cited for approaching the question with utmost caution was that the application of countermeasures was fraught with the likelihood of abuse as a result not only of power disparities but also of the fact that in many small and poor States where the decision-making was whimsical and no distinction was made between foreign relations and personal relations, countermeasures could start spirals of escalation detrimental to the stability of international life. Caution was viewed as all the more necessary in dealing with the problem as any possible safeguards against disproportionality and the use of countermeasures for punitive purposes could well be illusory. The views expressed in this connection are reflected in the sections devoted to the functions of countermeasures and to draft article 13 (see paras. 153-156 and 206-217 below).

129. Many members, while recognizing that the question of countermeasures was a very delicate one and should be approached with great circumspection, felt that the Commission could not ignore the realities of international life and should provide in the draft for a regime of countermeasures.

130. Some members commented on the alternative courses of action which were open to the Commission. One of those alternatives was to state that the draft was without prejudice to any question of countermeasures: this alternative was considered dangerous as it would leave the door open to the subjective exercise of those very powers whose use in former times had given rise to strong criticism. The other alternative was to abolish countermeasures as part of the law relating to the consequences of wrongful acts; this alternative was viewed, on the one hand, as counterproductive - to the extent that the draft might as a result prove unacceptable to States wary of having

their conduct brought into question - and, on the other hand, as objectionable in view of what one member terms the long established recognition of countermeasures under customary international law and the correct and explicit language of article 8 of Part One of the draft.

131. The inclusion in the draft of a prohibition of countermeasures was furthermore described as an extreme solution which ignored the fact that in any society a certain degree of coercion had to be tolerated, provided it did not go beyond certain limits. Trying to define the limits of countermeasures, as the Special Rapporteur had done, was viewed as a course of action compatible with the dictum of the International Court of Justice in the Corfu Channel case 40/ which, in effect, and inasmuch as the case in question involved a physical constraint operation carried out by armed forces in the territorial waters of a State, provided indications on the threshold and the nature of tolerable countermeasures. The Commission was therefore urged to refrain from considering further whether the regulation of countermeasures was opportune - at the present stage they were the only means whereby international law could be implemented when an international obligation was violated - and to formulate a regime based on the wish not to give undue advantage to powerful States and to permit all States to have their rights respected.

132. Many members acknowledged that because of the imperfect nature of law enforcement mechanisms, some latitude had to be left to direct and independent action by injured States and that since countermeasures would no doubt survive in international relations as measures to deal with internationally wrongful acts, their abuse had to be prevented. It was observed in this respect that,

---

40/ "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has in the past given rise to the most serious abuses and such as cannot, whatever be the present defects in international organizations, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States and might easily lead to preventing the administration of justice itself." (I.C.J. Reports, 1949, p. 35).

in the not so distant past, powerful States, claiming to have been injured by an act attributable to weak States, had taken reprisals against the latter in the form of punitive military expeditions, the object being to secure massive advantages for themselves; and it was asked whether those practices, which were contrary to justice, if not to international law, did not exist still, albeit in new forms. The Commission, it was added, could not conceal the phenomenon, particularly as it had devoted a special provision - article 30 of Part One - to the legitimate exercise of countermeasures in regard to an internationally wrongful act.

133. The members in question urged the Commission to direct its efforts towards discouraging self-help and reducing to a minimum the scope of permissible unilateral initiatives. The regulation of countermeasures was viewed as a constructive way of promoting respect for the law as long as it aimed at eliminating their punitive component, securing cessation, i.e., compelling States to return to compliance with the law and finally subjecting the underlying dispute to impartial, third-party settlement procedures. The Commission, it was remarked, should avoid fossilizing the subject and should identify and supplement the progressive elements which emerged from recent practice in order to strengthen the safeguards against possible abuses of countermeasures. The remark was made in this connection that the margin for permissible countermeasures was being narrowed down by the emergence of new opportunities for more effective use of existing mechanisms and procedures for the peaceful settlement of disputes, following the Helsinki process and the ending of the cold war. It was therefore suggested that, either in a draft article or in a commentary, the Commission should expressly state that, if a right of a State was infringed, the injured State might have recourse not only to unilateral measures but also to a whole set of lawful remedies ranging from retortion to intervention by international bodies.

134. A number of members pointed out that, in defining the regime of countermeasures, particular attention should be paid to the situation of developing, poor and weak States whose ability to take effective countermeasures differed quite obviously from that of developed States and the Commission was urged not to transpose into the field of law the power relationships that could exist at the political level.

135. On the other hand, the remark was made that power was a very relative concept and that, in the matter of countermeasures, some third world countries had no reason to be envious of certain developed countries. The Commission, it was added, should try to draft balanced rules without worrying too much about the political background.

136. Also referring to the general approach to the task of regulating countermeasures, some members posed the question whether concerted countermeasures should be left out. In this connection, the remark was made that the organized international community had a place in the draft articles even though ambitions in this field were still rudimentary. Countermeasures, it was stated, should be placed under some sort of collective control but the international community was slow in assuming that role.

137. Some members commented on the role of State practice in the elaboration of a regime of countermeasures. In this context, the remark was made that the actual jurisprudence on which it was possible to rely was limited to a very few cases and that it was not easy to extract customary rules from existing practice. Emphasis was placed on the need to study not only State conduct resulting in judicial decisions and arbitral awards but also State conduct which did not lead to litigation and manifested itself at the multilateral level (i.e., in the General Assembly and the Security Council) as well as at the regional and bilateral levels. It was also said that a large majority of newly independent developing countries had not contributed to the development of the existing practice and that insufficient attention had been paid to their conduct, a case in point being the law on the protection of foreigners which had developed in spite of the conduct of small States. Some members held the view that State practice in the area of countermeasures, being largely confined to powerful States, might not be sufficiently accepted to form the basis of the rules to be developed in this area.

138. Several members stressed that, in view of the paucity of State practice, the Commission's fundamental task would be the progressive development of international law, and that it should therefore define the theoretical basis of its work with great care and try to reconcile the interests of all States regardless of their level of development or their economic or military power. Emphasis was placed on the need to draw the consequences from the major

principles of international law such as the prohibition of the use of force and the peaceful settlement of disputes. Mention was also made of *jus cogens*, obligations *erga omnes* and the recognition of the existence of hierarchically higher rules and principles embodied in the Charter. In addition, it was recommended that contemporary international realities, the different legal systems they involved and the needs of consensus should be taken into account.

(b) Elements relevant to the inclusion of a regime of countermeasures in the draft articles

(i) The notion of countermeasures: terminological and conceptual aspects

139. As far as terminology is concerned, there was general agreement with the Special Rapporteur's view that, for the purposes of the draft articles, the notion of countermeasures was identical to that of reprisals. Most members felt that the term "countermeasures", which was neutral and had been used by the Commission in article 30 of Part One of the draft as well as by the International Court of Justice and by arbitral tribunals, should be given preference over the term "reprisals" which conveyed an idea of retribution and, inasmuch as it had often been associated with the use of force, had acquired a pejorative connotation with the emergence in international law of the prohibition of the use of force. A few members however expressed a preference for the term "reprisals" notwithstanding its unfortunate connotation. It was pointed out in this connection that the measures under discussion threatened international order and that the term "reprisals" had the advantage of focusing attention on their suspect nature.

140. Some members however stressed that the notion of countermeasures was broader than that of reprisals and encompassed in particular retorsion and more generally all the forms of lawful reaction to unlawful conduct. One member accordingly expressed the view that this idea should be duly reflected, at a future stage, either in one of the articles devoted to countermeasures or in a commentary.

141. A number of members agreed that the concept of self-help should be discarded. That concept, it was stated, did not have any legal foundation and served only to broaden the scope of self-defence.

142. Various analyses of the notion of countermeasures were provided in the course of the debate. For some, countermeasures should be viewed as interim

measures of protection conceived as a device to enforce compliance with the primary obligation breached; in that perspective, the action taken by way of countermeasures must be stopped or reversed as soon as the wrongdoer complied with the primary objective. Other members however felt that a distinction should be drawn between interim measures of protection and countermeasures inasmuch as the former aimed strictly at preventing or mitigating the effect of a wrongful act of a continuing character and should therefore not be subject to pre-conditions.

143. Another view was that recourse to countermeasures was originally a prerogative of pre-eminence, the exercise of which was left entirely to the discretion of States, and that the object of the present operation was to convert a prerogative of pre-eminence into a faculty of subrogation with a view to ensuring that abuses of the right to resort to countermeasures might be circumscribed by obedience to the law. Along the same lines mention was made of the "dédoublement fonctionnel" concept whereby certain unilateral acts were carried out by the State on behalf of the international community and emphasis was placed on the need to determine to what extent unilateral action taken by States was admissible under international law, to what extent the exercise of the right to take such action, if it existed, should be limited and to what extent it should be prohibited outright.

144. The question was also raised whether a countermeasure should not be analysed as a breach of an international obligation. The remark was made in this connection that, under article 30 of Part One, the wrongfulness of an act of a State was precluded if the act constituted a legitimate measure in consequence of an internationally wrongful act committed by another State. The question was asked why, instead of stipulating that the countermeasure was a breach of an international obligation which, in the circumstances, was rightful, the text did not provide that the countermeasure was a wrongful act unless the State concerned was in a position to establish circumstances exonerating it from wrongdoing. This question, it was noted, was central to the extremely important matter of where the burden of proof lay in the particular case.

145. As regards analogies between the instrumental consequences of internationally wrongful acts and private law concepts and institutions,

divergent views were expressed: while agreement was expressed with the Special Rapporteur's view that the issue of countermeasures hardly corresponded at all to the regimes of State responsibility recognized in national legal systems, the remark was made that some of the cases cited in the third and fourth reports, for example in connection with the principle *inademplenti non est ademplendum*, invalidated the Special Rapporteur's conclusion that analogies with private law sources were almost totally eliminated.

(ii) *The various types of measures to be envisaged in the present context*

146. Most members stressed that the restrictive approach to *self-defence* should prevail and that the stand taken by the Commission in article 34 of Part One of the draft should be strictly adhered to. The relationship between Article 2, paragraph 4, and Article 51 of the United Nations Charter was viewed as providing the best test of the latitude allowed, with Article 51 being narrowly interpreted because a broad interpretation would open the door to abuse by stronger States - an aspect which was also addressed in the context of the discussion of draft article 14 (see para. 228 below).

147. Some members however queried the inclusion of self-defence in the present context. The remark was made that under paragraph (3) of the commentary to article 30 of Part One, the term "countermeasures" did not involve the use of armed force and that furthermore the Commission distinguished between countermeasures (dealt with in article 30) and self-defence (dealt with in article 34). Thus, it was stated, "self-defence" did not fall within the ambit of countermeasures. Some members urged that the Commission could and should avoid dealing with questions relating to Article 2, paragraph 4, and Article 51 of the United Nations Charter in the current context.

148. Several members furthermore pointed out that the third and fourth reports purported to cover countermeasures applicable in the case of delicts and that under article 19 of Part One of the draft, as well as under the draft Code of Crimes against the Peace and Security of Mankind, self-defence was a response to a crime. The inclusion of self-defence in both reports illustrated, in their opinion, the difficulty of dealing separately, as far as countermeasures were concerned, with delicts and crimes. Another view was that the question of self-defence should be taken up when the Commission examined the

substantive consequences of international crimes since it only arose in connection with violations of the prohibition of the use of force which was a peremptory norm of international law. Mention was also made of the close relationship between the right to self-defence and other "instrumental measures" provided under the Charter as a response to acts which jeopardized international peace and security.

149. There was general agreement with the Special Rapporteur's view that the term "sanctions" should be confined to measures adopted by an international body. Some members referred in this connection to the Security Council as the most obvious example.

150. Several members agreed with the Special Rapporteur's view that measures of retortion had no place in a draft on State responsibility since they constituted licit, albeit unfriendly measures, recourse to which was admissible even if the State against which they were applied had committed no internationally wrongful act. Other members, however, advocated a more qualified approach. Some of them remarked that the availability and effectiveness of measures of retortion might raise questions as to the need for a State to turn to countermeasures. Some other members observed that a distinction should be drawn according to whether the measure of retortion was a response to an unfriendly act or to a wrongful act, and that, in the latter case, it formed part of the subject and was governed by the principle of proportionality. It was also said that retortion could not always be regarded as a legitimate action since, as acknowledged by the Special Rapporteur, there were circumstances where a State should, under the United Nations Charter, refrain from both countermeasures and retortion. Attention was further drawn to the fact that economic retortion or pressure was prohibited, for instance in article 18 of the Charter of the Organization of American States, and that there was no reason why the Commission should not build on what existed at the regional level.

151. As for reciprocity measures, the remark was made that their distinguishing feature lay in the fact that their application might either be intended to secure the cessation of the wrongful act and compliance with the secondary obligation of reparation in the broad sense of the term or result in an alteration of the primary obligation between the States concerned, leading

to a standard different from that of the original obligation. It was none the less generally agreed that they should not be considered as a distinct category of countermeasures and did not deserve special treatment. Rather, they were viewed as a particular application of the broader concept of reciprocity which extended to various areas of international law and relations. It was suggested that they be dealt with in the context of the question of proportionality. Some members however argued that the idea of reciprocity could have a useful place if it was confined to issues of diplomatic and consular relations.

152. As regards the regime of suspension and termination of treaties as countermeasures, the prevailing view was that one should rely as much as possible on the Vienna Convention on the Law of Treaties of 1969 41/ and in particular on its article 60. Attention was however drawn to a possible confusion between the regime of suspension and termination of treaties which formed part of the law of treaties and the consequences of the breach of a treaty which were more directly germane to the law of responsibility. In this connection, the remark was made that under the Vienna rules which, in relation to State responsibility, should presumably be viewed as *leges speciales*, procedural requirements must be complied with before a treaty was suspended or terminated. Perplexity was expressed at the fact that countermeasures in general should be subjected to a relatively liberal regime whereas the simple suspension of a treaty required a complex procedure which States might consider unduly cumbersome for practical purposes. It was furthermore stressed, on the one hand, that the Commission should limit the right to suspend or terminate treaties to cases where there was a material breach of an international obligation and exclude it altogether for treaties of a humanitarian character and treaties providing for "indivisible" or "integral" obligations in order to uphold the principle of "*pacta sunt servanda*" and, on the other hand, that the Commission should consider restricting further the right to suspend and terminate treaties by requiring the existence of a close link between the breach of an international obligation and the treaty in question.

41/ United Nations, *Treaty Series*, vol. 1155, p. 331.

(iii) Functions of countermeasures

153. Many members stressed that the Commission should focus on cessation and recourse to an agreed mode of settlement as the justification for countermeasures and move away from the concept of punitive reprisals which had no place in contemporary international law. The remark was made in this connection that most violations of international law were simply due to negligence and that in relationships between partners with the same legal standing under international law, none of the partners could pose as a "judge", particularly on the basis of subjective assessments. It was also said that if countermeasures were ascribed a punitive function, their use would be restricted to the handful of States which had the means to inflict punishment, and that would once against give rise to the problem of the inequality of States. Relying on the rule of proportionality to temper excesses so far as punitive intentions were concerned was viewed as unhelpful inasmuch as the precise meaning of proportionality was not always clear. It was therefore suggested to expressly provide in the draft that reprisals should not be recognized as having a punitive function, irrespective of the motive that prompted the injured State to take them. Other possibilities which were mentioned consisted in including an article prohibiting States from engaging in punitive reprisals or countermeasures, or spelling out somewhere in the draft that countermeasures constituted a remedy designed to induce the wrongdoing State to resume the path of lawfulness.

154. The question was however raised whether ruling out the punitive elements from the functions of countermeasures did not provide an illusory guarantee against abuse as it was difficult in practice to distinguish between punitive and compensatory aspects. The remark was made in this connection that the presence of a punitive intention was usually gleaned from the pronouncements that normally accompanied the taking of countermeasures and could be more or less skilfully concealed depending on the degree of sophistication of the legal machinery concerned.

155. The above notwithstanding, some members felt that the concept of punishment could be of some relevance in the context of countermeasures, on

the one hand in relation to international crimes which affected fundamental interests of the international community and on the other hand at the stage of the pacific settlement of the dispute.

156. The question of the functions of countermeasures was also addressed in the context of the discussion of draft article 11 (see para. 179 below).

(iv) The distinction between crimes and delicts in the context of countermeasures

157. Several members noted that the third and fourth reports purported to deal with countermeasures as applied to delicts, analogous measures in the case of international crimes being deferred for consideration at a later stage.

158. Some of them however observed that the reports did in fact address the question of measures applicable to crimes since most of the examples cited therein concerned the use of armed force, acts of terrorism, kidnapping of diplomats, massive intervention in the internal affairs of States etc. Such measures, it was remarked, called for consideration only as reactions to crimes, since the rule of proportionality would prohibit them if they were intended merely as a response to delicts. Doubts were expressed on the possibility of dealing separately, as far as countermeasures were concerned, with crimes and delicts.

159. The Special Rapporteur pointed out that his intention was not to deal with the consequences of crimes until a later stage. Knowing nothing about crimes other than what was stated in article 19 of Part One of the draft, he preferred to start with what was the least unfamiliar to him and then move gradually towards the unknown. He himself was inclined to think that there was no clear distinction between crimes and delicts and that the one gradually gave way to the other. He added that the examples cited in the third and fourth reports did not only concern crimes.

(v) The relationship between the regulation of countermeasures and the proposed Part Three on settlement of disputes

160. The view was expressed by one member that since the previous Special Rapporteur's 1985 draft for Part Three on dispute settlement could not be regarded as generally acceptable, it was not reasonable to base the draft of Part Two on a belief that Governments were ready to accept Part Three, which mandated a meaningful settlement procedure, i.e. a procedure that could

give a binding answer concerning the wrongfulness of the initial act and order reparation expeditiously. The remark was made that, while States could accept such a dispute settlement regime in a particular case and Part Two could be constructed in such a way as to encourage them to do so, it was unrealistic to expect across-the-board acceptance of such a regime for the whole of international law and to predicate Part Two on such a premise.

161. It was pointed out, on the other hand, that effective third party dispute settlement procedures were a *sine qua non* in modern international law in general, but particularly in the area of State responsibility and countermeasures, affording, as they did, protection for the small and militarily weaker States. Attention was drawn to the fact that the incorporation of such procedures into major law-making treaties was now less difficult than in the past. The Commission was therefore encouraged to make every effort to include such a system in Part Three of the draft.

162. In the light of the divergence of views reflected in paragraphs 160 and 161 above, the suggestion was made to exclude from the topic any articles on countermeasures as well as provisions on dispute settlement - the latter question being susceptible of separate treatment since it had no inherent connection with the topic of State responsibility.

163. The Special Rapporteur objected to such an approach, pointing out that carefully defined countermeasures were essential because they represented, for the time being, the most important means of ensuring minimum respect for international obligations and that procedures for settlement of disputes were also essential because they represented the only way of preventing abuses of countermeasures. He further remarked that any regulation of countermeasures which did not go hand in hand with dispute settlement procedures was fraught with the danger of abuse to the detriment of weaker and poorer States. He stated that the Commission had perhaps had the risk of abuse in mind when it had envisaged in the plan adopted in 1975 that Parts One and Two of the draft could be followed by a Part Three on implementation, which would *inter alia* aim at making up for the very serious drawbacks of unilateral countermeasures in the absence of international institutional controls. The Special Rapporteur felt that if Part Three was imaginatively, albeit prudently, drafted, it would establish an egalitarian and democratic system

encompassing all the means envisaged in Article 33 of the United Nations Charter and providing for organs composed of persons chosen ad hoc by the injured State and the wrongdoing State. Indeed it flowed from the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) that the advance acceptance of such a system could not be viewed by any State as inconsistent with sovereign equality. In his opinion, the Commission would seriously fail in its duty if it did not devote the utmost attention to peaceful settlement procedures. He recalled in this connection that at least two of the four categories of disputes referred to in Article 36, paragraph 2, of the Statute of the International Court of Justice fell within the ambit of State responsibility and that disputes which were amenable to judicial settlement were also amenable to arbitration. The Commission should not be discouraged by the reservations made in 1985-1986 to the previous Special Rapporteur's draft articles of Part Three. The present international situation was quite different and more encouraging.

(vi) Conditions for the legality of countermeasures

164. The conditions for the legality of countermeasures were set forth in the first three articles proposed by the Special Rapporteur in his fourth report, namely articles 11, 12 and 13.

Draft Article 11 as proposed by the Special Rapporteur in his fourth report 42/

165. Introducing the draft article, the Special Rapporteur stressed that under the proposed text, lawful resort to countermeasures was conditional upon (1) the actual existence of an internationally wrongful act and (2) the prior submission by the injured State of a "demand" of cessation/reparation - a requirement which highlighted one of the differences between self-defence and

---

42/ The draft article read as follows:

> "Countermeasures by an injured State
>
> An injured State whose demands under articles 6 to 10 have not met with adequate response from the State which has committed the internationally wrongful act is entitled, subject to the conditions and restrictions set forth in the following articles, not to comply with one or more of its obligations towards the said State."

countermeasures. The reference to the absence of an "adequate response" sought to meet the exigencies of security for both parties and the need for flexibility. The proposed text further made it quite clear that the right to resort to countermeasures was subject to the important conditions and restrictions provided for in subsequent articles. As regards the finality of countermeasures, the Special Rapporteur indicated that, although the punitive intent was likely to be present in the mind of the State organs which decided to resort to countermeasures against a wrongdoing State, it was not appropriate to recognize to the injured State a right to chastize. The text was therefore silent on the finality of countermeasures, as it seemed preferable to leave the matter to the practice of States, it being understood that the general rule of proportionality always applied.

166. The _existence of an internationally wrongful act_ was recognized as the _sine qua non_ condition for lawful resort to countermeasures. It was pointed out in this connection that acts falling under the categories defined in articles 29, 31, 32, 33 and 34 of Part One were not wrongful and that the Commission did not have to concern itself with reactions to such acts. A further requirement which was mentioned in this context was that the wrongful act should be one of unacceptable or significant consequences and not a minor technical one.

167. On the question whether the _bona fide_ conviction of the State concerned was in itself sufficient, some members took the view that, at the stage where the injured State was contemplating countermeasures, there was no objective determination that an internationally wrongful act had been committed: there was only a _bona fide_ belief on the part of the State resorting to the countermeasures. Reference was made in this connection to the Latin American doctrine which considered that there must be, in the thinking of the State which resorted to a countermeasure, on the one hand, a material element - the existence of an unlawful act - and, on the other hand, a psychological element, the conviction that resort to the countermeasure was the right course to follow. Other members felt that the _bona fide_ conviction of the State that it had been or was being injured by an internationally wrongful act was not in itself sufficient. In their opinion, several objective signs (refusal to

negotiate or refusal to accept resort to a settlement procedure) must come together to raise the presumption that a wrongful act had been committed.

168. The issue of who was to determine the existence of an internationally wrongful act was viewed as providing an illustration of the dilemma inherent on the question of countermeasures inasmuch as relying on the State concerned to determine the existence of an internationally wrongful act would be to the advantage of the more powerful States, whereas leaving the matter to the decision of a third party raised the question whether there was henceforth any need for countermeasures at all and whether the process of third party settlement should not be triggered instead. The remark was however made that a State which based its conduct on the existence of an internationally wrongful act acted at its own risk and might be held responsible if it turned out that none of its rights had, in fact, been infringed.

169. Some members expressed the view that the basis for lawful resort to countermeasures was not so much the internationally wrongful act as the prejudice caused by that act. The use in article 11 of the phrase "injured State" was viewed as insufficient in this respect and it was suggested to include a reference to the nature and gravity of the injury sustained. This approach was considered to have the threefold advantage of limiting abuses of the resort to countermeasures, restricting the number of States that could claim the right to resort to such measures and reducing the risk of subjective evaluations. Reference was made in this context to the Special Rapporteur's definition of countermeasures as "the generality of the reactions of a State in response to a breach of international law by which it is injured". The view was expressed that this definition should appear somewhere in the draft articles in order to spell out clearly the fact that, whereas the breach of international law gave rise to responsibility, it was the injury that permitted the State to react to the wrongful act, and that if there was no injury there could be no reparation and no countermeasures. The remark was made that the distinction had practical implications inasmuch as, in the absence of the prejudice requirement, any violation of the law would open the way to countermeasures, with the result that the most powerful would be free to set themselves up as the world's policemen and bring about the triumph not of the law, but of their conception of it. The view was expressed in this

connection that, while punitive functions could conceivably be ascribed to countermeasures in the case of crimes, the same was not true in the case of delicts with which article 11 and those that followed it purported to deal.

170. Referring to the views reflected in paragraph 169 above, the Special Rapporteur said that the existence of damage was certainly a condition for lawful recourse to countermeasures provided that the term "damage" was understood in the broad sense of encompassing legal or moral injury - the approach which the Commission had taken in article 5 of Part Two as adopted on first reading. 43/ That having been said, the countermeasure had to be lawful in relation to the damage or injury suffered, and that was a matter of proportionality. As regards abuses to which the use of countermeasures could give rise, the Special Rapporteur observed that examples from recent history showed that such abuses were not exclusively the work of powerful States.

171. On the issue of a prior protest and demand for cessation and/or reparation, there was agreement that the alleged author State should be given prior notification of the breach complained of, inasmuch as the alleged wrongdoer was entitled to know what obligation it had violated. The remark was made that this requirement should not involve excessive delays given the progress of communications.

172. Some members held that, by making the right of the injured State to resort to countermeasures dependent on the prior failure of its claims for cessation and reparation, an effective safeguard was established against unlawful and premature resort to countermeasures; others, however, thought it unreasonable to require the injured State to formulate its claims for reparation in detail before being able to take countermeasures. That issue, it was remarked, should come much later in connection with the procedure for peaceful settlement.

173. The Special Rapporteur agreed that the demand would not necessarily have to be in the precise terms in which a case was brought before the International Court of Justice or an arbitral tribunal, furthermore pointing

---

43/ See footnote 33 above.

out that, even in such forum, a process of refinement of the claim took place from the moment of the application to that of the formulation of conclusions. In his view, however, the prior demand or claim should be sufficiently precise to enable the alleged offending State to make "an adequate response", i.e. a response based on an enlightened assessment of the facts and of the consequences. The Special Rapporteur added that in practice, as a current case might exemplify, powerful States tended to resort to countermeasures without more ado on the basis of vague, undefined charges.

174. While the requirement of a prior demand was viewed as signalling one of the differences between countermeasures and interim measures of protection, the remark was made that interim measures of protection should not be exempt from certain minimum preconditions.

175. Some members envisaged the situation in which new events might occur in the interval between a finding of non-reparation of damage and the application of the preconditions for the exercise of countermeasures. The possibility was thus envisaged of an event attributable to the injured State and unconnected with the initial internationally wrongful act. The question was raised in this respect whether the notion of an equivalence of circumstances, which had an element of compensation about it, should not operate as an exception to the exercise of countermeasures. It was further remarked that recourse to countermeasures should be subject to the requirement that the law-breaking State should not itself have taken appropriate action.

176. The Special Rapporteur said that the first of those situations could be covered by the test of proportionality. As far as the second was concerned, he suggested to take care of it either by improving the drafting or elaborating in the commentary on the concept of adequate response.

177. The phrase "not to comply with one or more of its obligations" was viewed as having the advantage of succinctly encompassing the entire range of the measures which the injured State could resort to and circumventing complex definitional problems. Several members, however, suggested replacing "not to comply with" by "to suspend the performance of" in order to underscore the provisional character of countermeasures or, an even better solution in the view of some, stating expressly that countermeasures should cease as soon as their purpose had been achieved and be resorted to only in order to obtain

performance by the wrongdoing State of its secondary substantive obligations. A distinction was made in this context between interim and final countermeasures and the view was expressed that even where the countermeasures were in response to an unlawful act having irreversible consequences, they should aim at securing cessation and reparation and should therefore be reversible in character. In this connection, the situation was envisaged in which State A, having an unpaid claim against State B, nationalized property belonging to State B and subsequently obtained repayment of the debt. The opinion was expressed that in such a case the action taken by way of countermeasure should be stopped or reversed.

178. The suggested replacement of "not to comply with" by "to suspend the performance of" was viewed by some members as calling for further reflection as it entailed the risk of restricting the scope of application of countermeasures to obligations of a continuing character and excluding therefrom obligations requiring the achievement of a specific result. It was also pointed out that some obligations could not be effectively suspended and that a term was needed which combined suspension and revocation.

179. As regards the punitive or strictly reparatory purpose of countermeasures, it was acknowledged that, as explained in particular in the fourth report of the Special Rapporteur, the intentional omission in article 11 of a reference to the purpose of countermeasures did not rule out the punitive function, as evidenced by draft article 10 on satisfaction and guarantees of non-repetition proposed by the Special Rapporteur. The remark was however made that there was a significant difference between the substantive and the instrumental consequences of internationally wrongful acts. Indeed, several members felt that article 11 was inadequate as far as the functions of countermeasures were concerned and, as indicated in paragraph 153 above, some members suggested to expressly rule out any punitive functions for countermeasures.

180. With regard to the requirement of reversibility (see para. 177 above *in fine*) and to the legitimate aims of countermeasures, the Special Rapporteur stressed that even if the purpose of countermeasures was expressly limited to cessation and reparation, the element of retribution would remain present in

both the substantive and instrumental consequences of internationally wrongful acts and that the way to handle the problem was to prevent excessive countermeasures through the requirement of proportionality.

181. In view of the fact that the rule embodied in article 11 implied strict limits as to the obligations to which it was applicable, it was suggested that the proposed text should be followed immediately by an article or paragraph listing the categories of obligations which could not be the subject of countermeasures - something which could not of course be done until the second reading - and to include the list in article 30 of Part One in keeping with the approach taken in articles 29 and 33.

182. Other comments included: (1) the remark that the word "countermeasures" should appear in the text of the article and not only in the title; (2) the suggestion that the words "whose demands ... wrongful act" should be eliminated since the corresponding requirement was dealt with in article 12; (3) the remark that it was not clear whether the phrase "have not met with adequate response" encompassed the case of absence of response; and (4) the observation that it would perhaps be useful to require the existence of a link between the suspended obligation and the obligation breached with a view to limiting the freedom of action of the reacting State and reducing the risk of abuse by the powerful.

Draft Article 12 as proposed by the Special Rapporteur in his fourth report 44/

183. Introducing the draft article, the Special Rapporteur explained that paragraph 1 (b) made explicit a condition which article 11 implicitly provided

---

44/ The draft article read as follows:

"Article 12

Conditions of resort to countermeasures

1. Subject to the provisions set forth in paragraphs 2 and 3, no measure of the kind indicated in the preceding article shall be taken by an injured State prior to:

(a) the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which it is a party; and for by referring to "demands" and to "an adequate response". The requirement of an appropriate and timely communication appeared to the Special Rapporteur to be of such importance in the context of countermeasures that it should be mentioned already in Part Two instead of being relegated to Part Three which was to govern the further problem of the new general obligation relating to the settlement of disputes concerning the interpretation and application of the rules contained in the draft. Paragraphs 1 (a) and 2 (a) dealt with the requirement of prior exhaustion by the injured State of dispute settlement procedures. Under the first of those provisions, the "available" settlement procedures encompassed those provided by general international law, the United Nations Charter and any other dispute settlement instrument to which the State concerned was a party; they therefore included all the means listed in Article 33 of the Charter from the simplest forms of negotiation to the most elaborate judicial settlement procedures. By making the concept of "available procedures" all embracing instead of confining it, as had been envisaged by the previous Special Rapporteur, to third party settlement procedures susceptible of being unilaterally initiated, subparagraph (a) of

---

(b) appropriate and timely communication of its intention.

2. The condition set forth in subparagraph (a) of the preceding paragraph does not apply:

(a) where the State which has committed the internationally wrongful act does not cooperate in good faith in the choice and the implementation of available settlement procedures;

(b) to interim measures of protection taken by the injured State, until the admissibility of such measures has been decided upon by an international body within the framework of a third party settlement procedure;

(c) to any measures taken by the injured State if the State which has committed the internationally wrongful act fails to comply with an interim measure of protection indicated by the said body.

3. The exceptions set forth in the preceding paragraph do not apply wherever the measure envisaged is not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered."

paragraph 1 imposed maximum restraint on the injured State in resorting to countermeasures. On the other hand, paragraph 2 (a) balanced the stringent requirement contained in paragraph 1 (a) by providing that the said requirement did not apply if the wrongdoing State did not cooperate in good faith in selecting and implementing available settlement procedures.

184. Some members commented generally on the question of compliance with dispute settlement obligations as a condition of the lawfulness of resort to countermeasures. In this connection, it was said that, while the task of enhancing the role and broadening the spectrum of peaceful means for the settlement of disputes would be tackled by the Commission in considering Part Three of the draft, it ought to be kept in mind even during the examination of the conditions of admissibility of unilateral countermeasures. Several members referred in this context to Article 2, paragraph 3, and Article 33 of the United Nations Charter and to regional systems whose members were under an obligation to exhaust all available means for the peaceful settlement of disputes before taking any step that might involve the violation of a rule of international law. Mention was also made of the 1934 resolution of the International Law Institute which stated, _inter alia_, that, where machinery existed for the settlement of disputes, there could be no justification for resorting to reprisals.

185. The opinion was, however, expressed that the obligations concerning the peaceful settlement of disputes were not the only ones to be taken into consideration and that there was a first limitation on the unilateral use of countermeasures in the provisions of Chapter VII of the United Nations Charter, in the sense that States were no longer free to resort to countermeasures once the Security Council had decided on sanctions in accordance with Articles 41 and 42 of the Charter. It was also noted that that _faculté_ might be subject to other restrictions, for instance, in the context of the International Civil Aviation Organization or when the International Court of Justice had ordered interim measures of protection. Regret was therefore expressed that the Special Rapporteur should have focused exclusively on compliance with dispute settlement obligations and kept silent on the limitations deriving from the powers of organs of international organizations. Emphasis was placed in this context on the general need to

collectivize countermeasures, translating them into sanctions of the organized international community. Further comments on this point are reflected under the sections devoted to articles 2 and 4 of Part Two (See paras. 251-259 and 260-266 below).

186. In reply, the Special Rapporteur indicated that the concept of "collectivized measures" or countermeasures applied as sanctions of the "organized international community" might be acceptable in the context of egalitarian treaty systems instituting guarantees of compliance with the obligations set forth in a regional or specialized regime, albeit with caution and subject to the possibility for the States concerned to "fall back" on the guarantees provided under general international law. As regards in particular the reference made by one member to Articles 41 and 42 of the United Nations Charter, the Special Rapporteur noted that caution should be used in that respect in view of the structure of the international body entrusted with the implementation of those articles. It was also with this consideration in mind that the Special Rapporteur had expressed serious perplexities about article 4 of Part Two as adopted on first reading.

187. With specific reference to the proposed text, the condition set forth in paragraph 1 (a) was described as the cornerstone of the concept of countermeasures and of their role in the system devised to redress the situation created by an internationally wrongful act. It was emphasized that, in order to prevent the injured State being given too much latitude to act as a judge in a case to which it was a party and in the absence, mentioned by the Special Rapporteur, of an adequate institutional framework, it was important to establish that available amicable settlement procedures must be exhausted as a prerequisite to the application of countermeasures, especially in view of the great inequality revealed among States in the exercise of their faculté to apply countermeasures and the advantage enjoyed in that respect by powerful or rich States in the absence of adequate third party settlement commitments.

188. While admitting the need to eliminate subjectivity when deciding on the existence and the gravity of a wrongful act and to strengthen the credibility of dispute settlement methods, it was pointed out that the relationship between countermeasures and specific settlement procedures was complex, since the use of a countermeasure could be justified not only as a means of

encouraging the wrongdoing State to have recourse to a settlement procedure, but also as a subsidiary method to be used in the case of the lack or failure of a settlement procedure. Emphasis was therefore placed on the need to strike a balance between controlling the use of countermeasures and not giving undue advantage to the wrongdoing State, for instance, by setting time-limits to prevent the wrongdoing State from using delaying tactics or allowing the injured State to adopt provisional measures with a view to protecting its rights.

189. In this connection, the view was expressed that it was unjust to favour the wrongdoing State by requiring, as a precondition, the exhaustion of all amicable procedures available under general international law. Such an approach was viewed as inconsistent with the clearest precedent in that matter, the 1978 Franco-American Arbitration in the Air Services Agreement case, 45/ and as likely to penalize States which had agreed to the largest possible number of dispute settlement procedures. It was accordingly suggested to merely provide that countermeasures which impede the amicable settlement of the dispute or aggravate the dispute are prohibited and to include such a provision in article 14.

190. Referring to the practical drawbacks of the approach reflected in paragraph 1 (a), some members remarked that international dispute settlement processes were slow and time-consuming. For instance, negotiations - which were likely to be the first procedure to be applied - could last six months and a subsequent resort to the International Court of Justice could take another two years. The injured State could not realistically be expected to defer the taking of countermeasures for two and a half years. Attention was also drawn to the risk that a wrongdoing State could pursue negotiations indefinitely and that some limitation might therefore be required in paragraph 1 (a) either by referring only to third party dispute settlement procedures or by including a proviso concerning cases where the injured State had reason to believe that the peaceful settlement procedure would not lead to a resolution of the dispute within a reasonable time.

45/ United Nations, Report of International Arbitral Awards, vol. XVIII, p. 485.

191. Some members suggested providing for a clearer articulation between the right to take countermeasures and the obligation to resort to settlement procedures. The question was asked in this context whether the dispute settlement mechanism should be invoked before or after countermeasures were embarked upon. The view was also expressed that, having regard to the fact that the object of a reprisal might well be to bring about the establishment of a settlement procedure, a countermeasure might be acceptable provided that its lawfulness was examined in the context of such a procedure.

192. Another suggestion was to make the exhaustion of amicable settlement procedures not a precondition for resort to countermeasures, but a parallel obligation, in other words, to provide for a regime in which the right to impose countermeasures would be suspended if the wrongdoing State agreed to a dispute settlement procedure in which a legally binding determination as to the wrongfulness of the act could be reached and reparation required. In support of that approach, it was said that only once the reacting State had reason to believe it was engaged in proceedings that formed part of an institutional framework ensuring some degree of enforcement did the justification for countermeasures disappear.

193. The remark was made, on the other hand, that such an approach was acceptable only to the extent that the imposition of countermeasures did not place the party taking them in a position of strength in the negotiations, thereby enabling it to impose its law on the other party even if the "unlawful" nature of the facts or acts relied upon in support of the countermeasures was not proved conclusively.

194. With reference to the views reflected in paragraphs 188 to 192 above, the remark was made that, in the cases covered by article 12, it could not be claimed that the matter brooked no delay and that, under Article 33 of the United Nations Charter, the parties to a dispute were bound to seek a solution through settlement procedures, of which there were many.

195. Also referring to those views, the Special Rapporteur stressed first that an injured State would normally be able to demonstrate that the wrongdoing State was refusing to negotiate or to comply with the requirements of a third party settlement procedure or was resorting to delaying tactics to escape its obligation of cessation or reparation; secondly, that the injured State could

resort to interim measures of protection; and thirdly, that the injured State was protected from delaying tactics by paragraph 2 (a), since it was relieved from the requirement in paragraph 1 (a) by the wrongdoing State's failure to cooperate.

196. Drafting observations on paragraph 1 (a) included the remark that the settlement procedures provided for in an instrument to which the injured State was a party should be given priority over the other procedures referred to in that paragraph.

197. As regards paragraph 1 (b), it was noted that doctrine and State practice tended to support the Special Rapporteur's position that an appropriate and timely communication of the injured State's intentions was a prerequisite for lawful resort to countermeasures. Although it could be presumed that the wrongdoing State was aware of the consequences of the international wrongful act, of his obligations in this respect and of the injured State's right to resort to countermeasures, an express indication of the latter State's determination to avail itself of this right could be as effective as the countermeasures themselves. Paragraph 1 (b) was thus widely viewed as unobjectionable.

198. Paragraph 2 (a) was also widely considered to be reasonable.

199. Paragraph 2 (b) was found acceptable by some members inasmuch as, in the words of one member, an injured State was entitled to protect itself without being subject to preconditions - if within limits. The question was asked in this context whether there might not be other measures, having limited functions, for which exemption from certain procedural requirements might be appropriate.

200. The paragraph, however, gave rise to doubts on the part of other members. Concern was expressed that it might weaken the fundamental rule enunciated in Article 33 of the United Nations Charter. The question was further raised whether it was appropriate to except interim measures of protection from the general regime, particularly as countermeasures could themselves be equated with measures of protection in view of their temporary character and their object, i.e. the protection of a right, and as it would be

very difficult in practice to distinguish between the two types of measures. As an intermediate solution, it was suggested to provide for a qualified right to take interim measures, pending the decision of a tribunal. The remark was made in this connection that sometimes, where assets were seized, the measures were likely to be ineffectual unless taken immediately.

201. As for paragraph 2 (c), which also dealt with interim measures but in the classical sense of measures indicated in the framework of a third party settlement procedure, agreement was expressed with the underlying idea that, if the wrongdoing State failed to comply with an interim measure of protection, the *faculté* of the injured State to resort to countermeasures was restored: indeed, failure to comply with the measures indicated was itself an internationally wrongful act committed in the framework of a settlement procedure, which was proof of the ineffectiveness of the procedure and legitimized resort to countermeasures.

202. The question was raised whether the measures dealt with in subparagraphs (b) and (c) were the only ones which should be exempted from the procedural requirement laid down in paragraph 1.

203. Paragraph 3 was generally viewed as unclear. It was suggested that if the intention was to prohibit measures not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered, then the idea should be reflected not in the limited context of the exceptions to the rule enunciated in article 12 but in article 14 on prohibited countermeasures or in an additional paragraph of article 11 or in a new opening paragraph of article 12. Doubts were also expressed on the appropriateness of using language taken from Article 2, paragraph 3, of the Charter on the prohibition of the use of force as a means of settling disputes to indicate solutions to the problems connected with the policy of countermeasures. The question was further asked whether the object of the paragraph was not already covered by the rule of proportionality. The concluding clause of the paragraph gave rise to doubts inasmuch as the concept "justice" was indefinable and matters relating to peace and security were for

the Security Council to determine. Concern was finally expressed that the paragraph should have the effect of unilaterally imposing on an injured State the duty not to aggravate disputes.

204. The remark was made that, if article 12 was revised along the lines indicated in paragraphs 185, 189 and 203 above, the resulting text could merely provide that the injured State may resort to countermeasures, first, where the State to which the internationally wrongful act may be attributed does not cooperate in good faith in choosing an amicable settlement procedure; secondly, where an international body competent to impose sanctions or interim measures of protection has not intervened previously; thirdly, where the State to which the internationally wrongful act may be attributed fails to respect those sanctions or interim measures of protection; and, fourthly, provided that the intention to take countermeasures has been communicated properly and in a timely fashion.

205. Referring to the views reflected in paragraph 203 above, the Special Rapporteur acknowledged that the wording of paragraph 3 was infelicitous. The question he had intended to raise in that paragraph was whether the countermeasures which were exempt from the requirement of the exhaustion of amicable means of settlement under subparagraphs (a), (b) and (c) of paragraph 2 should not be subject to the requirement of compatibility with the exigencies of peace and security and justice. He remarked in this connection, that peace and security could be endangered not only by threats to the peace, breaches of the peace and acts of aggression but also by State conduct which provoked such reactions. The Special Rapporteur was further tempted to mention in paragraph 3 or in a separate paragraph the obligation of States parties to a dispute to refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult - a provision which was borrowed from the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe and had a counterpart in the Declaration on Friendly Relations, where it was supplemented by a reference to the purposes and principles of the United Nations.

Draft Article 13 as proposed by the Special Rapporteur in his fourth report 46/

206. Introducing the draft article, the Special Rapporteur indicated that he had deliberately opted for a negative rather than a positive formulation. The text did not specify the extent to which countermeasures might be disproportionate nor did it require that they should be manifestly disproportionate. It however provided that, in determining whether countermeasures were not disproportionate, account should be taken of the gravity not only of the internationally wrongful act, but also of its effects.

207. Proportionality was generally recognized as a crucial element in determining the lawfulness of a countermeasure. Attention was drawn in this context to the risk of abuse inherent in the factual inequality of States and concern was expressed that proportionality was often lacking in the action taken by certain countries in response to violations of their rights. In this context, a comparison was drawn between equivalence and proportionality and it was said that in no case could the test of proportionality be stretched to authorize resort to totally unequal means nor be used as a justification for the realization of results totally unequal to the effects of a wrongful act. Reference was made in this connection to the arbitral award in the Air Services Agreement case 47/, where it was stated that the objective of countermeasures was "to restore in a negative way the symmetry of the initial position".

208. Some members held that the principle of proportionality provided an effective guarantee inasmuch as countermeasures that were out of proportion to the nature of the wrongful act could give rise to responsibility on the part of the State using such measures.

46/ The draft article read as follows:

"Article 13

Proportionality

Any measure taken by an injured State under articles 11 and 12 shall not be out of proportion to the gravity of the internationally wrongful act and of the effects thereof."

47/ See footnote 45 above.

209. Other members stressed that the principle was difficult to apply in practice. The remark was made that the Special Rapporteur had abandoned the distinction made by his predecessor between action taken by way of reciprocity, i.e. connected with the obligation breached, and action taken by way of reprisal with regard to obligations different from the one breached, with the result that a breach in one field of law could trigger off a countermeasure in another area of relations between the States concerned totally removed from the one where the original obligation was breached. The view was expressed that, in cases not involving reciprocal measures, proportionality was a false friend giving the impression that a yardstick against which the reasonableness of action and reaction could be measured with exactitude existed when in fact none was there. The remark was also made that countermeasures were lawful steps taken in response to an internationally wrongful act and that it was difficult to equitably weigh them in relation to each other.

210. While some members concurred with the Special Rapporteur that the rule on proportionality should be formulated in negative terms, others expressed preference for a positive formulation of the rule in order to limit the area of subjective assessment. In that respect, it was emphasized that the principle of proportionality should also cover measures of retortion and measures of reciprocity and operate in the strictest possible way to ensure that powerful States could not take advantage of their position to the detriment of weaker States. The view was, on the other hand, expressed that it was with the grossly disproportionate reactions that the Commission should concern itself.

211. Several members felt that a more precise definition of the scope and content of proportionality would be desirable. The criterion of equity, for example, was viewed as too vague and uncertain since it generally depended on the definition of equity established during a dispute settlement procedure.

212. With a view to providing clearer guidolines, it was suggested that the conduct of the injured State should be proportionate to the two legitimate aims of countermeasures, namely cessation and reparation, since applying more compulsion than was necessary to achieve those ends was a sure indication of the disproportionate nature of the reprisal. It was also said that, as a

rough gauge, account should be taken of the importance of the questions of principle that might be raised by the initial breach as well as of the gravity of the internationally wrongful act and of its effects. The view was expressed in this connection that the reference in the fourth report to "the importance of the interest protected by the rule infringed and the seriousness of the breach" might be helpful in enunciating the rule on proportionality. The remark was made however that, as long as the assessment of the gravity of the wrongful act and of its effects was left to the subjective appreciation of the injured State, it would be difficult to rule out *lex talionis*. It was emphasized that the involvement of a third party would represent significant progress.

213. Some members insisted on the role of damage in assessing proportionality. In that connection, one member stressed that the relationship between countermeasures and damage was not constant and could be affected by the frustrations to which the conduct of the wrongdoing State gave rise.

214. The view was however expressed that, if the countermeasure was to be proportionate to the injury, it took on a punitive character and that the true criterion should rather be that the countermeasure must be necessary to bring about correction and recourse to peaceful settlement procedures.

215. The real objective of countermeasures was described as a decisive element in considering the question of proportionality. It was asked in particular whether a grouping of States could use, for instance, a claim of violation of human rights as a reason for no longer honouring specific obligations towards another State when the actual objective was to impose on that State an economic and social system which was more favourable to the grouping of States in question.

216. Other comments included, first, the remark that the reasons why the Special Rapporteur had opted against the inclusion of the word "manifestly" before the words "out of proportion" were unclear; secondly, the observation that the phrase "not be out of proportion" could be replaced by "not be disproportionate"; and thirdly, the suggestion to move the proposed provision immediately after article 11 (either as an article 11 *bis* or in a second paragraph of article 11) so as not to break the continuity between articles 12

and 14 and in order to make it clear that the purpose of the rule of proportionality was to temper the effects of the right provided for in article 11.

217. In his summing up of the discussion on article 13, the Special Rapporteur, referring to the suggestion that only "grossly disproportionate" or "totally unequal" countermeasures should be prohibited, said that such a solution would give the injured State too much leeway and might lead to abuse. Furthermore, such language was even less restrictive than the words "manifestly disproportionate" proposed by the former Special Rapporteur. In his opinion, any countermeasure which was disproportionate, no matter what the extent, should be prohibited. As regards the distinction, made by the former Special Rapporteur, between measures of reciprocity and reprisals, the Special Rapporteur pointed out that measures of reciprocity were also reprisals and could be applied in a disproportionate manner. Countermeasures other than reciprocity did exist and might well be the most frequently used. Thus, most countermeasures were "false friends" and all of them presented the same difficulty. As for the question whether proportionality should be assessed in relation to elements other than the gravity of the wrongful act and its effects and with reference to the issue of the purpose of a given countermeasure referred to in paragraph 215 above, he stressed that the refusal by a group of States to honour its obligations was not so inappropriate if the violation of human rights had been linked to a particular economic and social system.

(vii) Prohibited countermeasures

Draft article 14 as proposed by the Special Rapporteur in his fourth report 48/

218. Introducing the draft article, the Special Rapporteur indicated that five main issues were involved: (a) the prohibition of the use of force;

48/ The draft article reads as follows:

Prohibited countermeasures

1. An injured State shall not resort, by way of countermeasure, to:

(a) the threat or use of force [in contravention of Article 2, paragraph 4, of the United Nations Charter];

(b) respect for human rights; (c) diplomatic law; (d) jus cogens and erga omnes obligations; and (e) respect for the rights of third parties. He stressed that the prohibition of armed countermeasures under Article 2, paragraph 4, of the United Nations Charter, as elaborated in the Declaration on Friendly Relations and in other United Nations and non-United Nations instruments, should be expressly provided for in the draft articles, first, because the special character of the relationship between the injured State and the offending State made it advisable to affirm the continued validity of certain general restrictions to the freedom of States and, secondly, because States were particularly tempted to evade their obligations whenever the law was not sufficiently explicit and exhaustive. Referring to the doctrine according to which the prohibition laid down in Article 2, paragraph 4, of the Charter, should be subject not only to the exception envisaged in Article 51, but also to other exceptions, he took the view that such a doctrine - with regard to which he had expressed in his report strong reservations - should in any case not affect the prohibition of armed reprisals. If and in the measure in which the said doctrine was acceptable, it could only cover those hypotheses in which resort to force might be justified by the grave emergency situations for which Articles 42 to 51 of the Charter had been devised - situations which might justify or not, according to the case, a broadening of the concept of self-defence, but not an exception to the prohibition of armed countermeasures in reaction to an internationally wrongful act.

(b) any conduct which:

(i) is not in conformity with the rules of international law on the protection of fundamental human rights;

(ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;

(iii) is contrary to a peremptory norm of general international law;

(iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act.

2. The prohibition set forth in paragraph 1 (a) includes not only armed force but also any extreme measures of political or economic coercion jeopardizing the territorial integrity or political independence of the State against which they are taken.

219. As far as paragraph 1 (b) (i) was concerned, the Special Rapporteur was of the view that restrictions on the lawful resort to countermeasures should be confined to the core of human rights, the identification of which should be left to the further development of human rights law.

220. As regards paragraph 1 (b) (ii), he suggested that the restriction to countermeasures concerning the inviolability of specially protected persons should be approached with great caution, bearing in mind that, since diplomats were protected by the international law of human rights, only those countermeasures that might hinder normal diplomacy should be prohibited.

221. As regards paragraph 1 (b) (iii), he acknowledged that *jus cogens* rules were by definition rules which were not subject to derogation by way of countermeasures or otherwise, but none the less recommended that the point be expressly covered in the draft.

222. As for *erga omnes* obligations dealt with in paragraph 1 (b) (iv), he considered it self-evident that a State that resorted to a countermeasure should not do so to the detriment of the legal rights of States having nothing to do with the wrongful act.

223. Referring to the meaning of the term "force" and to paragraph 2 of article 14, the Special Rapporteur acknowledged that the matter was a controversial one. He pointed out that, in a number of texts adopted at the international and regional level, the prohibition of certain forms of political and economic coercion had been dealt with under the principle of non-intervention and that, in practice, political and economic measures were regarded admissible as countermeasures, notwithstanding a trend towards prohibiting those that jeopardized the territorial integrity or political independence of the State against which they were taken.

224. Two points were raised as regards the article in general. On the one hand, the approach reflected in the article was viewed as too analytical, the result being that the proposed text unnecessarily raised unsettled questions and entailed the risk of undesirable *a contrario* interpretations.

225. On the other hand, concern was expressed that the catalogue of prohibited countermeasures might not be exhaustive. By way of illustration, reference

was made to the case of a boundary treaty (fortified as such under the 1969 Vienna Convention on the Law of Treaties against the rule of fundamental change of circumstances) which would be concluded but not yet implemented (a situation which could easily arise for example in the case of a treaty ceding back a territory at the expiry of a lease): the question was raised whether the "ceding" State could invoke the breach by the other State of an obligation owed to it under a multilateral instrument on human rights in order to suspend performance of the treaty. The remark was made that similar issues might arise with respect to the right of self-determination.

226. In reply, the Special Rapporteur indicated that all depended on the kind of violation involved. In the event of a gross (or mass) violation of human rights or of the violation of the right of self-determination of a whole people, compliance with a treaty of cession could be suspended. The question was one of proportionality, provided no other problem arose, such as that of jus cogens.

227. As regards paragraph 1 (a), there was general agreement that the most important restriction to the use of countermeasures derived from the prohibition of the use of force set forth in Article 2, paragraph 4, of the Charter, a prohibition which, it was stated, formed part of general unwritten international law and was a peremptory norm from which no departure could be allowed by treaty or otherwise. Reference was also made in this context to the Declaration on Friendly Relations and to the Definition of Aggression (General Assembly resolution 3314 (XXIX)) and it was recalled that, under the Treaty for Mutual Assistance in Military and Security Matters, American States regarded the first use of force as illegal.

228. It was generally recognized that the Commission could hardly admit any derogation from the prohibition of armed reprisals implied in Article 2, paragraph 4, of the United Nations Charter and spelled out in the Declaration on Friendly Relations and that neither "reasonable armed reprisals" nor forms of self-help involving the use of armed force nor armed intervention based on necessity were allowed under contemporary international law. Concern was expressed that the justifications for the use of force cited by the Special Rapporteur in his reports should, in reality, reflect attempts at broadening the scope of the only legitimate exception to the use of force,

namely, self-defence, and that the report failed to indicate that claims of self-defence were very often rationalizations for other, unacknowledged objectives that had prevailed during the era of spheres of influence. It was also said that the doctrine espousing a broad interpretation of the concept of self-defence was based on pre-Charter cases which were no longer relevant to contemporary thinking on the concept and that the lawfulness of self-defence based on necessity was not generally accepted either as doctrine or by States themselves. Reference was made in this context to the judgement of the International Court of Justice in the Corfu Channel case.

229. The Special Rapporteur explained that he had deemed it necessary to cover in some detail in his reports hypotheses of resort to force which might obscure the basic prohibition of armed reprisals contained in the Declaration on Friendly Relations in order to highlight, first, the confusion around the concepts of self-help, self-defence, pre-emptive self-defence, state of necessity, humanitarian intervention and armed intervention for the protection of nationals, secondly, the lack of foundation of some of the applications of those concepts in order to justify resort to force and, thirdly, the importance of differentiating them from the concept of countermeasures.

230. Other comments on paragraph 1 (a) included (1) the remark that the bracketed words should be retained or - an even better solution according to one view - replaced by a general reference to the United Nations Charter; and (2) the suggestion to insert after "United Nations Charter" a reference to "subsequent international law".

231. As regards subparagraph (b) (i), there was general agreement on the restriction based on respect for human rights. The remark was made in this context that, as treaty regimes were being set up at the international level to ensure the observance of human rights, there was less and less room for responding to violations of human rights by way of countermeasures inconsistent with human rights. Two other arguments were adduced in support of the exclusion of countermeasures not in conformity with rules on the protection of human rights, namely, (1) the difficulty of establishing a measure of equivalence or proportionality in such cases, given the economic, cultural, religious and even political differences among States in this regard; and (2) the inadmissibility of subjecting the nationals of the

wrongdoing State to measures contrary to the principles governing human rights, the treatment of foreign nationals and the protection of victims of war.

232. Several members insisted on the need to define the threshold beyond which countermeasures could be allowed in this area, since not every human right could qualify as constituting an absolute limitation. In this connection, the view was expressed that, while life and physical integrity should not be the target of countermeasures, it might be perfectly lawful for a State, if the freedom of movement of its nationals was curtailed in another State, to impose restrictions on the freedom of movement of the nationals of that other State. Another approach which was suggested in order to clarify the prohibition of countermeasures in the area of human rights was to spell out the categories of human rights to be protected.

233. Some members commented on the phrase "fundamental human rights", which, it was remarked, was borrowed from the Preamble of the United Nations Charter. Another solution suggested was to use the phrase "human rights from which there could be no derogation", which was contained in article 4, paragraph 2, of the International Covenant on Civil and Political Rights 49/ and corresponded to the wording used in article 53 of the 1969 Vienna Convention on the Law of Treaties to define peremptory norms of international law. It was pointed out, however, that using such a phrase might make subparagraph (b) (i) appear superfluous, since it would then be serving the same purpose as subparagraph (b) (iii), and it was thus considered preferable to maintain the proposed text, thereby leaving the door open to changes in the concept of fundamental human rights, which might one day encompass certain economic and social rights and even the right to a clean and wholesome environment. The word "fundamental" gave rise to different views. Some members felt that it did not really convey the Special Rapporteur's intention, which was apparently to confine the prohibition to elementary human rights. Others felt that the expression "fundamental human rights" distinguished correctly between rights from which no derogation was possible (for instance,

---

49/ United Nations, Treaty Series, vol. 999, p. 171.

the right to life) and rights which could be suspended. According to one view, the latter included the property rights of foreign nationals present in the injured State and recent State practice revealed cases not only of expropriation of foreign property by way of countermeasures, but also examples of the freezing of the assets of foreigners as a reaction to the wrongful conduct of the State to which they belonged. That approach gave rise to certain objections: it was pointed out, on the one hand, that the mutuality of interests between the capital-exporting countries and the third world would warrant protection against nationalization and the freezing of assets as countermeasures and, on the other hand, that countermeasures should be essentially a matter between States and should have minimal effects on private persons lest they might amount to collective punishments.

234. In his summing up, the Special Rapporteur explained that in using the phrase "fundamental human rights", he had not intended to question the usual terminology borrowed from Article 1, paragraph 4, of the United Nations Charter or to exclude freedoms. He had merely wanted to restrict the scope of the text to the "core" of human rights and freedoms which should not be infringed as a more or less direct consequence of a resort to countermeasures.

235. Other comments on subparagraph (b) (i) included: (1) the observation that humanitarian law should be expressly mentioned inasmuch as the most important prohibition of countermeasures was to be found in humanitarian conventions; (2) the remark that subparagraph (b) (i) should be consistent with paragraphs 3 (b), (c) and (d) of article 19 of Part One; and (3) the suggestion that the Special Rapporteur might wish to take account of resolution 1991/72 adopted on 6 March 1991 by the Commission on Human Rights, 50/ which considered "that the establishment of further clear rules regulating responsibility for human rights violations could serve as one of the basic preventive guarantees aimed at averting any infringements of human rights and fundamental freedoms" and further invited the competent United Nations bodies to consider the question of State responsibility for violations of international obligations in the field of human rights and fundamental freedoms.

50/ Official Records of the Economic and Social Council, 1991, Supplement No. 2 (E/1991/22 - E/CN.4/1991/91), pp. 162-163.

236. As regards subparagraph (b) (ii), restrictions deriving from the inviolability of diplomats and specially protected persons were viewed by some members as widely and generally accepted. The remark was made that, since the purpose of a regime of countermeasures should be to resolve, not to aggravate, disputes, it was important to leave open the normal channels of diplomacy. It was also stated that the rules of diplomatic law had enough of a political basis and purpose to place them beyond the scope of the regime of countermeasures.

237. Several members on the other hand pointed out that, in actual life, the breach of diplomatic relations was a very effective countermeasure which was often resorted to in practice both at the bilateral level (breaking off or suspension of diplomatic relations, refusing to recognize Governments, recalling the Ambassador or the entire diplomatic mission, declaration of *persona non grata*) and at the multilateral level. They therefore felt it preferable to focus not on the normal operation of diplomacy but rather on the prohibition of countermeasures threatening the inviolability of persons or premises protected by diplomatic law or, as the previous Special Rapporteur had done, on the prohibition of the suspension of diplomatic and consular immunity. It was also emphasized that there was no justification for prohibiting the use of reciprocal measures in the framework of diplomatic law in respect, for example, of restrictions on the freedom of movement of diplomatic agents and that resort to countermeasures in that area should not be prohibited, but considerably limited.

238. Other comments included: (1) the remark that the proposed text was too vague in the absence of a definition of "serious prejudice" and could be replaced by "hinders the normal operation of bilateral or multilateral diplomacy"; and (2) the observation that the phrase "the normal operation of diplomacy" could be replaced by the words "the efficient performance of the functions of diplomatic missions" - language which was borrowed from the 1961 Vienna Convention on Diplomatic Relations. 51/

51/ United Nations, *Treaty series*, vol. 500. p. 95.

239. Replying to both observations, the Special Rapporteur confirmed that it must remain possible to sever diplomatic relations by way of countermeasures. At the same time he stressed that diplomats should be respected both in their person, or as a matter of respect for human rights, and in their function for the purpose of not jeopardizing bilateral or multilateral diplomatic exchanges among States, in so far as diplomatic relations were maintained; otherwise, a State should be entitled by way of reprisal - on a reciprocal or other basis - to suspend one or more of their privileges.

240. The need for *subparagraph (b) (iii)* was questioned on the ground that *jus cogens* rules were, by definition, peremptory norms from which no departure could be allowed. The remark was however made that the prohibitions provided for in the preceding subparagraphs did not cover the whole of *jus cogens*, a concept which varied over time, thus ensuring that the instrument being prepared would automatically reflect any changes in the international legal thinking. Other comments included: (1) the remark that some way should be found to indicate that the prohibition of the use or threat of force mentioned in paragraph 1 (a) was a peremptory norm *par excellence*; (2) the suggestion to indicate in the commentary that the prohibition of conduct contrary to a peremptory norm of international law did not attempt to decide which rules of *jus cogens* would forbid countermeasures; and (3) the remark that differences of opinion remained in relation to *jus cogens* and that it would be better to refer to the basic rules of international law.

241. In discussing *subparagraph (b) (iv)*, some members referred to the developments devoted by the Special Rapporteur in his fourth report to the problem of *erga omnes* obligations. The question was asked in particular whether it was correct to differentiate between peremptory norms, obligations *erga omnes* and the norms of customary international law and to apparently assimilate obligations flowing from multilateral treaties to *erga omnes* obligations. Several members felt that the concepts of *jus cogens* and obligations *erga omnes* were largely similar in scope. Reference was made in this connection to article 53 of the Vienna Convention on the Law of Treaties

and to the judgement of the International Court of Justice in the Barcelona Traction case: 52/ the Court's categorization, it was stated, was based precisely on the value of the interest concerned, the idea being that, when basic interests of the international community were at stake, all States were duty bound to respect them. Also with regard to the views expressed by the Special Rapporteur in his fourth report on the solution to the problem of *erga omnes* obligations proposed by the former Special Rapporteur in his draft article 11, 53/ it was pointed out that, to fill the gap in that draft article in respect of *erga omnes* obligations arising from rules of general customary or unwritten law, it would be enough to add the words "or a rule of customary international law by which they are bound" to article 11, paragraph 1.

242. Subparagraph (b) (iv) was viewed as providing third States with a useful guarantee. Some members however cautioned against too sweeping formulations. The question was raised whether the legitimacy of countermeasures should be denied only because such measures had some unintended or incidental spill-over effect - particularly in a world growingly characterized by interdependence - as long as such spill-over effect was dealt with through attribution to the wrongdoing State.

243. The subparagraph was furthermore criticized on the ground that it seemed to deprive, for instance, a State party to the International Covenant on Civil and Political Rights whose nationals were denied their freedom of movement in another State party to the Covenant from the right to retaliate by restricting the corresponding right of the nationals of that other State on the ground that the first State was under an obligation to uphold the freedom of movement of the nationals of all the States parties to the Covenant. Such a result was viewed as unacceptable.

244. In his summing up, the Special Rapporteur emphasized that, in his opinion, *jus cogens* rules and *erga omnes* rules were two different things. Subparagraph (b) (iv) was not confined to *erga omnes* rules. It simply prohibited countermeasures which infringed the rights of States other than the

---

52/ *I.C.J. Reports*, 1970 p. 3.

53/ *Yearbook ... 1985*, vol. II, (Part One), document A/CN.4/389, p. 12.

wrongdoing State. This applied to the infringement, by way of countermeasures, of rules, whether customary or deriving from a multilateral treaty, which created rights also for States other than the law-breaking State. The Special Rapporteur acknowledged that there might be spill-over effects and that a solution would have to be found to the problem, as well as to the problem referred to in paragraph 243 above.

245. As regards paragraph 2, many members agreed that extreme measures of political or economic coercion could have consequences as serious as those arising from the use of armed force and that the proposed provision was worthy of further consideration.

246. Objections were however expressed to the proposed formulation. The question was raised whether it was not introducing new and alien elements into the interpretation of the United Nations Charter. The relevant *travaux préparatoires* and subsequent interpretations of Article 2, paragraph 4, were cited as evidence that the term "force" as used in that provision meant exclusively armed force and did not cover other forms of unlawful coercion. The view was expressed in this connection that it was unwise and unnecessary to attempt to reopen the question of the meaning of the term "force" or to speculate on the reasons why the Latin American proposal on that point had been rejected at the San Francisco Conference. Concern was voiced that General Assembly resolution 2131 (XX) should have been cited as a basis for questioning the long-standing view on the meaning of the term "force" in Article 2, paragraph 4, given the context of the adoption of that resolution, the statements made at the time and the record of the relevant discussions in the Friendly Relations Committee.

247. While the view that it was not for the Commission to interpret the Charter was generally shared, a number of members concurred with the Special Rapporteur that countermeasures in the form of extreme measures of political and economic coercion should be prohibited. Mention was made in this context of the traditional Latin American position on the matter and it was suggested to draw inspiration from articles 18 and 19 of the Charter of the Organization of American States which prohibited the use or encouragement of the use of economic, political or any other type of measures to coerce another State. Various other alternatives were envisaged for dealing with the

issue. It was suggested to use a formula such as: "An injured State must not, as a countermeasure, resort to the threat or use of force in contravention of the provisions of the Charter of the United Nations". Attention was also drawn to the language to be found in the fourth report, which spoke of measures aimed at the subordination of the exercise of the target State's sovereign rights. A third alternative was to prohibit countermeasures which jeopardized the territorial integrity or political independence of States, without referring to political and economic coercion. In this context, the remark was made that the word "extreme" was infelicitous and that the criterion to be used was that of the effect of the measure concerned. A fourth alternative, namely, basing the prohibition of countermeasures not on Article 2, paragraph 4, of the Charter, but on the principle of non-intervention, was also mentioned. It was recalled in particular that the unlawfulness of intervention had been recognized by a series of General Assembly resolutions - which, it was stated, should not be dismissed as being of a purely declaratory value - including resolution 2131 (XX), the Declaration on Friendly Relations, the Definition of Aggression, resolutions 31/91 and 32/155 and the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (resolution 36/103). Using the principle of non-intervention in the present context was, however, viewed by some members as unacceptable inasmuch as it would, given the very large scope of the duty of non-intervention, lead to the prohibition of virtually all countermeasures. The remark was also made that the fact that a measure taken as a first strike was prohibited under the principle of non-intervention did not mean that such a measure was prohibited as a reaction to unlawful conduct.

248. Some members questioned the advisability of considering the issue of extreme measures of economic coercion in the present context. It was said in particular that most political and economic measures which States took were not countermeasures *stricto sensu*, but measures which were not prohibited by international law, such as, for example, cessation of developmental aid, and that those which amounted to countermeasures were often of low intensity and generally did not give rise to concern about international peace and security. The remark was also made that countermeasures could not be resorted

to if only interests, as opposed to rights, were infringed and that, in the area of economic relations, countermeasures were strictly governed by several international agreements and self-contained regimes. Another point which was made was that, since extreme measures of coercion could only be legitimate - if at all - in answer to wrongful conduct of similar intensity, the problem raised in paragraph 2 should be deferred to the stage when the Commission addressed the question of the consequences of crimes.

249. Some members suggested addressing the question from the point of view of the rule on proportionality. Attention was drawn in this context to the possibility that the original act might itself have jeopardized the territorial integrity or political independence of the injured State: in such a case, it was remarked, the effect of paragraph 2 was to prevent the injured State from going as far in taking reprisals as the offending State had done in committing the wrongful act. It was accordingly suggested to draft the article on proportionality so as to confine extreme measures to cases where the injured State was responding to similar measures jeopardizing its territorial integrity or political independence. Disagreement was on the other hand expressed with the view that extreme measures of coercion could adequately be governed by the test of proportionality. The question was asked whether a State having violated a jus cogens obligation could be retaliated against by the injured State also violating the same obligation in equal or proportional measure and whether the concept of subjugated State was still valid in contemporary international law.

250. The Special Rapporteur concluded that there was substantial support for a prohibition on economic and political coercion. The question had also been raised as to the source of such a prohibition. Did it derive from Article 2, paragraph 4, of the United Nations Charter or an equivalent rule of general international law, or from the principle of non-intervention? In his view, if there was a condemnation of economic and political coercion, it mattered little whether it was formulated by reference to Article 2, paragraph 4, or to the principle of non-intervention. If therefore it was felt that, given the increasing economic interdependence of nations and the analogy with the effects of resort to armed force, such a rule should be laid down as a matter of the progressive development of the law, the Drafting Committee could

perhaps deal with the matter, with respect both to the actual formulation of the provision and to the source to which the prohibition should be attributed.

(c) The question of countermeasures in the context of articles 2, 4 and 5 of Part Two adopted on first reading at previous sessions of the Commission

(i) The question of self-contained regimes

251. The Special Rapporteur began by remarking, in regard to so-called self-contained regimes, that they were characterized by the fact that the substantive obligations they set forth were accompanied by special rules concerning the consequences of their violation; the question was whether the rules constituting those regimes affected - and, if so, in what way - the right of States parties to resort to the countermeasures provided for under general international law. Although the Luxembourg Court of Justice had repeatedly confirmed the principle that States members of the European Economic Community did not have the right to resort to unilateral measures under general international law, scholarly opinion was divided. Specialists in Community law considered that the system of the European Economic Community constituted a self-contained regime, whereas scholars of public international law argued that the treaties concerned did not really differ from other treaties and that the choice of the contracting States to be members of a "community" could not, at the present stage, be regarded as irreversible. In the view of the Special Rapporteur, the claim that it would be legally impossible, as a last resort, for States members of the European Economic Community to fall back on the measures afforded by general international law did not seem to be fully justified, at any rate not from the point of view of general international law. As far as human rights were concerned, the Special Rapporteur, relying on both the literature and recent practice, was inclined to the opinion that neither the system established by the International Covenant on Civil and Political Rights nor the regime embodied in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 54/ prevented the States concerned from resorting to the

---

54/ United Nations, Treaty Series, vol. 213, p. 221.

remedies afforded by general international law and that no self-contained regime existed in the field of human rights. He tended towards the same conclusion as regards the General Agreement on Tariffs and Trade and also in regard to diplomatic law, a sphere in which restrictions on countermeasures seemed to derive not from any "speciality" of diplomatic law, but from the normal application, in that particular area, of the general rules and principles constituting the regime of countermeasures. The Special Rapporteur also had most serious doubts as to the admissibility, even *in abstracto*, of the very concept of self-contained regimes as subsystems of the law of State responsibility or, to use the expression employed by the previous Special Rapporteur, "closed legal circuit(s)". To be sure, substantive rules or any more or less articulated and organized set of such rules might well contain provisions to ensure that the consequences of their violation were better regulated. But the rules in question did not exclude the validity or application of the rules of general international law with regard to the substantive or instrumental consequences of internationally wrongful acts; they merely represented derogations from the general rules, such derogations being admissible only to the extent that they were not incompatible with the general rules.

252. In the opinion of the Special Rapporteur, the exercise of the *facultés* of unilateral reaction provided for under general international law was and must remain possible, on the one hand, in the case in which the State injured by a violation of the self-contained system resorted to the conventional institutions and secured from them a favourable decision, but was not able to obtain reparation through the system's procedures; and, on the other hand, in the case in which the internationally wrongful act was an ongoing violation of the regime, the injured State having in such a case the right, if the wrongdoing State persisted in its unlawful conduct while conventional procedures were in progress, to resort simultaneously to "external" measures calculated to protect its primary or secondary rights without jeopardizing a "just" settlement of the dispute through the procedures provided for under the system.

253. The Special Rapporteur explained that article 2 of Part Two 55/ was questionable in relation to both customary rules and special rules governing treaties. He pointed out that the aim pursued by States in embodying within a treaty special rules governing the consequences of its violation was not to exclude, in the relations between those States, the mutual guarantees deriving from the normal operation of the general rules on State responsibility but to strengthen the normal, inorganic and not always satisfactory guarantees of general law by making them more dependable, without renouncing the possibility of "falling back" on less developed, "natural", guarantees. He therefore considered a presumption of total abandonment of the "natural" guarantees as contained in article 2 to be doubly objectionable, first because it defeated the purpose of the establishment of special regimes by States by attributing unintended derogatory effects to such regimes, and second because, by making the general rules "residual", it defeated the very purpose of the codification and progressive development of the law of State responsibility. He therefore suggested that the article should specify, first, that the derogation from the general rules set forth in the draft derived from contractual instruments and not from unwritten customary rules and, second, that, for a real derogation from the general rules to take effect, the parties to the instrument should not confine themselves to envisaging the consequences of the violation of the regime but expressly indicate that, by entering the agreement, they were excluding the application of the general rules of international law on the consequences of internationally wrongful acts. He further suggested that, in the commentary to the article, it should be made clear that a derogation provided for under a contractual instrument would not prevail in the case of a violation which was of such gravity and magnitude as to justify, as a proportionate measure against the law-breaking State, the suspension or termination of the system as a whole.

254. Several members took the view that the Commission did not have to pronounce on the question of self-contained regimes because the matter was one

---

55/ See footnote 33/ above.

of treaty interpretation, more specifically of determining whether the treaty involved a renunciation, on the part of the States concerned, of the right to take countermeasures under general international law, assuming that the measures provided for under the treaty were inadequate. As regards the particular case of a regime based on customary rules, the remark was made that it had to be determined whether some or all of the rules on which such a regime was based were of a jus cogens character, in which case there could be no derogation from them. Doubts were expressed on the appropriateness of trying to provide a general answer to those questions by resorting to the notion of self-contained regimes, inasmuch as each case would have to be determined on its own merits.

255. Some members indicated that they were inclined to share the Special Rapporteur's analysis that in all cases there was a "fall-back" to the remedies provided under international law. In that connection, as much "integration" as possible was recommended, meaning complementarity between an overall legal system and any special subsystems, which brought to mind the old debate on the opposition between legal "macrocosm" and "microcosm". It was also said that the matter deserved further reflection, taking into account the tendency in State responsibility to have differentiated regimes for special types of responsibility.

256. Other members urged a cautious approach to the matter. While due note was taken of the Special Rapporteur's position that any "external" unilateral measures should be resorted to only in extreme cases, the view was expressed that, when States specified as part of a treaty regime certain sanctions for any violation of that regime, it should be understood that what they expressly provided excluded other measures under any other system and that, if their intent was not clear, the presumption should be in favour of exclusion rather than inclusion of such measures.

257. Some members held the view that, as a matter of principle, procedures under existing international treaties should take precedence and that, while there might be a residual "fall-back" entitlement of the injured State to resort to countermeasures unilaterally, collective responses to unlawful conduct should be favoured and the unfortunately rare examples of self-contained regimes viewed as models to be followed in other fields of

international life. Along those lines, the remark was made that the position of the Special Rapporteur was difficult to reconcile with his conclusion that self-contained regimes were "*biens juridiques* (legal assets) of high importance" since they tended to limit the situations in which a State took the law into its own hands. It was also pointed out that to affirm that States parties to independent regimes always had the right to resort to unilateral countermeaures was tantamount to vesting that right with the value of a *jus cogens* rule - something which was not in keeping with the progressive development of international law.

258. While it was recognized that article 2 of Part Two as adopted on first reading could, where there was a self-contained regime, be interpreted as precluding the operation of the rules of the draft under preparation, the remark was made that the article could also be interpreted as not totally excluding the rules in question, since they would have a residual function if the independent regime proved inadequate. It was furthermore suggested that, when the Commission reverted to article 2, it ought probably to consider the relationship between the draft in course of preparation and international agreements governing responsibility in particular areas (transport of nuclear material, space objects, pollution, etc.).

259. In his summing up, the Special Rapporteur indicated that his basic idea was that self-contained regimes - some of which beneficially reduced, to some extent, the inorganic state of inter-State relations and in that sense certainly constituted a positive element - did not replace completely the regime of State responsibility, with regard either to the substantive or to the instrumental consequences of an internationally wrongful act. As for article 2, he was merely suggesting that it should be amended to ensure that the possibility of "fall-back" was not excluded, as it appeared to be under the article as worded.

(ii) The relationship between the draft under elaboration and the United Nations Charter

260. The Special Rapporteur pointed out that the effect of article 4 56/ would be to subordinate the provisions of the draft on State responsibility both to

---

56/ See footnote 33/ above.

the provisions of, and to the procedures provided for in, the United Nations Charter on the maintenance of international peace and security and, in particular, to any recommendations or decisions adopted by the Security Council in the discharge of its functions with respect to dispute settlement and collective security. While, in the opinion of the Special Rapporteur the Security Council was empowered under the Charter to make non-binding recommendations under Chapter VI and binding decisions under Chapter VII, it was not, according to the prevailing doctrinal view, empowered, when acting under Chapter VII, to impose settlements under Chapter VI in such a manner as to transform its recommendatory function under Chapter VI into binding settlements of disputes or situations.

261. In the view of the Special Rapporteur, article 4, as formulated, might open the way to difficulties. For the moment, he could think of two examples. First, if a Security Council decision under Chapter VII did affect a dispute or situation between one or more injured States and one or more wrongdoing States in a manner not in conformity with the rules laid down in a convention on State responsibility, of which article 4 formed part, what would be the implications for the relationship in terms of responsibility, whether substantive or instrumental, as between the States concerned? Second, in the event of such a situation, what would be the relationship between the competence of the International Court of Justice on the one hand and the competence of the Security Council on the other, for instance in a case where, on the basis of a valid jurisdictional link, State B unilaterally brought a case against wrongdoing State A before the International Court of Justice on the ground that State A had not complied with State B's demand for cessation or reparation? The Special Rapporteur was aware that the Commission's mandate was not sufficiently broad to enable it either to interpret the Charter of the United Nations and, in particular, Chapters VI and VII, or to determine the relationship between the Security Council and the International Court of Justice or to determine the consequences that Article 103 of the Charter would have on any specific provisions of the law of State responsibility as codified by the Commission and accepted by States in a convention. He was, however,

concerned about the effects of article 4 and feared that if such a provision were to be retained, the Commission would have to carry out an in-depth examination of issues which lay outside its mandate.

262. Some members felt that the Commission should not attempt in its draft on State responsibility to resolve those problems arising under the Charter which were a matter for the Security Council. Some members disagreed with the comments of the Special Rapporteur on the ground that they were inconsistent with the responsibilities of the Security Council, the object of Chapters VI and VII of the Charter and contemporary practice. One member suggested that the place to address the problem was in the commentary where the following points could be included: (1) given the purposes and principles of the Charter, it was not to be expected that the Security Council would use its power to deny any State its legal rights or remedies, including the right to take lawful countermeasures; (2) it was recognized that the Security Council had the primary responsibility for maintaining international peace and security; (3) it was accepted that the Security Council had the power to oversee the use of countermeasures and to indicate whether, in any given case, it believed them to be disproportionate; (4) the Council might request a State to delay the taking of countermeasures when, in its view, they would tend to aggravate the situation and lead to a threat to international peace and security, and when there was a reasonable prospect of peaceful settlement; and (5) when the wrongdoing State was recalcitrant and refused to cease its unlawful conduct or to accept pacific settlement, the Security Council, beyond asking for a reasonable delay, would have no right to demand that a State should not take lawful countermeasures.

263. Disagreement was expressed with this approach. The remark was made that lawful countermeasures were by definition of low intensity and would therefore normally be of no concern to the Security Council. If, on the other hand, countermeasures threatened international peace and security, then the Security Council would be justified, by virtue of its primary responsibility under the United Nations Charter, to issue the necessary directions. It was further stated that the scope of Article 25 of the Charter was a matter of great legal debate and that to subject such a provision to inflexible

interpretation in the context of the development of a regime of countermeasures would be an unacceptable course of action for all States.

264. Several members concurred with the position explained by the Special Rapporteur that the power of decision of the Security Council was strictly confined to measures aimed at re-establishing international peace and security under Chapter VII of the Charter and that the Council was not empowered to impose on States settlements or settlement procedures in relation to disputes or situations dealt with in Chapter VI, on which it could only make recommendations.

265. It was suggested to delete from article 4 the words "as appropriate" since the draft articles should not be inconsistent with the Charter provisions.

266. In his summing up, the Special Rapporteur stressed that the very controversial concept of an "organized international community" called for caution and appropriate reservations when one moved into the realm of the competence referred to in article 4 of Part Two. For the sake of brevity, he referred to The Hague Recueil des Cours 1972/73 (vol. 137), pp. 629 et seq., and especially 663 et seq., and 682-684. In his opinion, the unqualified reference to the provisions and procedures of the Charter concerning the maintenance of international peace and security would not seem unconditionally appropriate in order to implement the rules of a convention on State responsibility with due regard for the equality of States and the rule of law in international relations.

(iii) The question of differently injured States

267. The Special Rapporteur observed that, according to the definition of an injured State in article 5, of Part Two, 56/ an internationally wrongful act might consist not only in conduct giving rise to unjust material damage but also, more broadly, to conduct resulting in the infringement of a right, such infringement constituting, with or without damage, the injury. He said that although most international rules continued to set forth obligations the violation of which affected only the rights of one or more States, that bilateral pattern did not hold for the rules of general or collective interest that must be complied with in the interests of all the States to which the rules applied. The violation of obligations arising, for example, under rules

concerning disarmament, promotion of and respect for human rights and environmental protection, termed "erga omnes obligations", simultaneously injured the subjective rights of all the States bound by the norm, whether or not they were specifically affected, with the exception, of course, of the subjective right of the State that had committed the violation. In the view of the Special Rapporteur, it was now necessary to establish the consequences of the fact that erga omnes obligations had corresponding omnium rights and to determine, for example, whether the violation of an erga omnes obligation placed all the injured States in the same situation and whether it placed them in the same situation as the violation of a different kind of obligation. In his opinion, the notions of a "third State" and an "indirectly injured State" should both be rejected. For example, the erga omnes rules on the protection of human rights created, among the States to which they applied, a legal relationship characterized by the obligation to ensure the enjoyment of human rights for everyone, irrespective of nationality. A violation of that obligation by State A would therefore constitute a simultaneous infringement of the corresponding rights of States B, C, D, E, etc., and, as the right in question was the same for all (the right to have State A respect the human rights of persons under its jurisdiction), the violation would not affect any one of those States more directly than the others. Undoubtedly, one of the injured States might feel particularly affected if the violation of the obligation concerned persons related to it, ethnically, for example, but that did not make its injury legally more direct than that suffered by the other States. Another example, taken from the law of the sea, would be the unlawful closing by coastal State A of a canal situated within its territorial waters and linking two areas of the high seas, a decision which would affect:
(i) the interests of any State whose ships had been on the point of entering the canal when it was closed to navigation; (ii) the interests of any State whose ships had been sailing towards the canal in order to cross it;
and (iii) the interests of all other States, because, according to the law of the sea, all States were entitled to the free use of the canal. Since all States were entitled to the free use of the canal, they were all legally injured by the decision of State A, even though there might be some difference between them in respect of the extent of the damage sustained or feared. The

Special Rapporteur therefore arrived at the conclusion that the distinction between "directly" and "indirectly" injured States did not hold water and that the differing situations were distinguished by the nature or the extent of the injury. The fact remained that the breach of an _erga omnes_ obligation injured a plurality of States, which were not necessarily injured in the same way or to the same degree. It must therefore be determined to what extent each of those States was, on the one hand, entitled to claim cessation, restitution in kind, pecuniary compensation, satisfaction and/or guarantees of non-repetition, and, on the other hand, entitled to resort to sanctions or countermeasures. Until the present, those problems had undoubtedly been considered in connection with wrongful acts frequently labelled as "crimes", but they might well arise also with regard to consequences of more common wrongful acts, usually referred to as "delicts". The problems arose in a different way depending on whether the relevant rules - _erga omnes_ rules or more or less general rules - envisaged procedures for ensuring their implementation and for sanctioning violations. There was no need, in order to solve what the Special Rapporteur preferred to call the problem of "equally" or "unequally" injured States, to reconsider the articles adopted or to draft new articles; a proper understanding and application of the existing general rules would suffice, on condition, however, that a clause was added to article 5, which related to the definition of an "injured State", providing that, whenever an internationally wrongful act affected more than one State, each of the injured States was entitled to exercise the rights and _facultés_ laid down in the relevant articles.

268. In the light of the above, the Special Rapporteur suggested a very tentative draft of a possible article 5 _bis_. 57/

57/ The suggested draft article read as follows:

"_Article 5 bis_

Whenever there is more than one injured State, each one of them is entitled to exercise its legal rights under the rules set forth in the following articles."

269. In the course of the discussion, emphasis was first placed on the need to distinguish between the question of a plurality of injured States and the question of *erga omnes* obligations. The remark was made in this connectionthat *erga omnes* obligations were part of *jus cogens* and consequently related to international crimes, whereas the problem of a plurality of injured States arose in connection with any regime of international obligations. Attention was drawn in this context to the distinction made by the Special Rapporteur between obligations *erga omnes* and obligations *erga omnes partes*.

270. Some members agreed that the question of non-directly affected States was worthy of further consideration. The Special Rapporteur's objections to the concepts of non-directly injured, specially affected and third States were viewed as persuasive particularly in the case of a right to cessation and the general entitlement to reparation. Two separate categories of problems were mentioned in this context. The first related to the balance between reactions by various injured States in a situation where there was more than one such State under the terms of article 5. Assuming that no coordinated, collective ("horizontal") action was undertaken by those States, it was likely that each injured State would be predominantly concerned with its own relationship with the State which had committed the wrongful act. Taken alone, that conduct might seem reasonable. But what if, collectively, the conduct of all the injured States amounted to a disproportionate response? A provision to the effect that each State should respond with due regard to the responses of other injured States was viewed as too vague. The second and more serious category of difficulties lay in the fact that, although all injured States were equal within the meaning of article 5, one or several States would, in some situations, suffer unquestionably more damage than others. For example, State A might engage in repressive discriminatory conduct against nationals of State B contrary to the provisions of the International Covenant on Civil and Political Rights. Under article 5, every State party to the International Covenant would be an injured State, but there could be no doubt that State B would be damaged to a significantly greater degree than others. The approach whereby no priority whatever was given to State B would give rise to some problems. Any State could, of course, call for restitution in kind. But it

might well happen that State B, after engaging in lengthy diplomatic exchanges with State A, decided not to insist on restitution in kind and, instead, to accept some other form of reparation. Were other States that were injured States under article 5 to be allowed in such a case to insist upon restitution in kind? The Special Rapporteur's approach, based not on the direct or indirect character of the injury but on the nature and degree of the damage suffered, was considered by some members as having the advantage of placing the problem on the firmer ground of damage, but as preserving uncertainties about the position of the various injured States towards which there were obligations that had been violated, and about the substantive or instrumental consequences of the wrongful act according to the nature and degree of the damage suffered.

271. In this connection, disagreement was expressed with the attempt of the Special Rapporteur to show that, in the case of a violation of a multilateral obligation concerning human rights or the environment, all States were in the same position. It was pointed out that although, under the United Nations Charter, the prohibition of aggression constituted a general rule binding on all States in their mutual relationships, it was the direct victim of aggression which had the primary right of self-defence and that, even though other States could be involved in collective self-defence, the International Court of Justice, in the case concerning Military and Paramilitary Activities in and against Nicaragua, had clearly stated that there existed a difference in legal status between the actual victim of aggression and other States which, in a somewhat artificial sense, could be said to be "legally affected". 58/

272. The prevailing view was that the problem was one of locus standi and of reasonableness in the intensity of the reaction. It was pointed out in this connection that countermeasures were taken by a State at its own risk and that their reasonableness would ultimately be judged in the context of peaceful settlement procedures and by reference to whether the acting State was directly or indirectly injured and whether it took countermeasures when a more directly injured State did not.

58/ I.C.J. Reports, 1986, p. 15 et seq.

273. As for article 5 *bis*, it was welcomed on three counts - for the fact that the notion of an "injured State" did not *ipso facto* imply egalitarian treatment of injured States, for relying on the definition *stricto sensu* of an internationally wrongful act in order to identify the injured State or States, and for establishing, on the basis of that definition alone, the rights or *facultés* enjoyed by each State. Some members nevertheless raised the question whether this new provision was really necessary; it was suggested instead to indicate either in the draft articles themselves or in the commentary, first, that the capacity of differently injured States to take countermeasures should be proportional to the degree of injury suffered by the State taking the measures and, second, that if the most affected State or States disclaimed *restitutio in integrum*, no other State should be able to claim it. Other members believed that, instead of conferring a right of response on indirectly injured States, a better course would be to provide that the violation of an *erga omnes* rule should first and foremost give rise to a collective reaction or to action within the framework of institutional mechanisms.

274. Some members indicated that they preferred not to comment on proposed article 5 *bis* as the discussion of such a provision might call in question article 5 as adopted on first reading.

275. Three other issues were raised in the present context: (1) the problem of a plurality of wrongdoing States; (2) the question of collective countermeasures, i.e. the case where the most affected State might seek assistance from others; and (3) the question of non-recognition. On the last point the view was expressed that non-recognition and abstaining from rendering assistance were a particularly appropriate consequence in the case of a plurality of injured States and the question was asked whether the corresponding duties should not find their way into the instrumental consequences.

276. In his summing up, the Special Rapporteur said that he would give careful consideration to the views expressed in the course of the debate. He remained of the view that a provision along the lines of article 5 *bis* was needed to dispel the confusion engendered by the concept of an "indirectly" injured State which, in the case of human rights and also of certain aspects of the environment, could limit the possibilities for a lawful reaction, which

should, in fact, be preserved. As for non-recognition, he indicated that he had envisaged it as a countermeasure. He was thinking of course of cases where there was an obligation to recognise. As far as the act of recognition was concerned, States remained free to recognize or not a foreign Government or State. That did not mean, however, that the non-recognizing State could lawfully ignore the existence of the wrongdoing State, for example send its airplanes to fly over that State. Viewed as a countermeasure, non-recognition was subject to the same limitations as those set for countermeasures in the draft articles. Lastly, he drew attention to the advisory opinion rendered by the International Court of Justice in the case concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) 59/ on the non-recognition of South Africa's sovereignty over Namibia.

59/ I.C.J. Reports, 1971, pp. 4-58.

CHAPTER IV

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

277. The Commission, at its thirtieth session in 1978, included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic. 60/

278. The Commission, from its thirty-second (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur. 61/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

279. The Commission, at its thirty-sixth session, in 1984, also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures

---

60/ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic, and to report to it thereon. For the report of the Working Group see *Yearbook ... 1978*, vol. II, (Part Two), pp. 150-152.

61/ For the five reports of the Special Rapporteur, see *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2, *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2, *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360, *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373, *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

referred to in the schematic outline 62/ and a study prepared by the secretariat entitled "Survey of State paractice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 63/

280. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received seven reports from the Special Rapporteur from its thirty-seventh session, in 1985 to its forty-third session, in 1991. 64/. At its fortieth session, in 1988, the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General provisions) and Chapter II (Principles). 65/ At its forty-first session, in 1989, the Commission referred to the Drafting Committee also the revised version of those articles which were already referred to the Drafting Committee at the previous session. 66/

62/ *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

63/ *Yearbook ... 1985*, vol. II (Part One) *Addendum*, document A/CN.4/384.

64/ For the seven reports of the Special Rapporteur, see *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394, *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402, *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405, *Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413 and Corr.1 (English only) and Corr.2 (French only), document A/CN.4/423 and Corr.1 and 2, document A/CN.4/428 and Corr.1 and 4 (all languages), Corr.2 (English only), and Corr.3 (Spanish only) and Add.1 and document A/CN.4/437 and Corr.1.

65/ For the text see *Yearbook ... 1988*, vol. II (Part Two), p. 9.

66/ See Report of the International Law Commission on the work of its forty-first session, (*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10*) (A/44/10), p. 222, para. 311. Further changes on some of those articles were again proposed by the Special Rapporteur in his Sixth Report, see ibid., (A/45/10), para. 471.

B. Consideration of the topic at the present session

1. The eighth report of the Special Rapporteur

281. At the present session, the Commission considered the Special Rapporteur's eighth report A/CN.4/443 and Corr.1 and Corr.2 (Spanish only), at its 2268th to 2273rd and 2282nd meetings held between 12 to 23 June and on 8 July 1992. At the conclusion of the discussion, the Commission established a Working Group to examine certain general aspects of the topic. On the basis of the recommendations of the Working Group, the Commission took the decisions reflected in paragraphs 341 to 349 below.

282. The eighth report of the Special Rapporteur briefly reviewed the status and the purpose of the articles that he had so far proposed. It indicated that apart from the first nine articles now before the Drafting Committee, other articles that had been proposed were merely exploratory, except for article 10 on the principle of non-discrimination, a principle which was generally supported by the Commission. The eighth report presented a more extensive examination of the development of the principle of prevention and proposed nine articles thereto. It also attempted to define the concepts of risk and harm more clearly.

283. In his eighth report, the Special Rapporteur referred to what he understood to be the majority view in the last session of the Commission and in the Sixth Committee of the General Assembly. That view favoured a separate instrument of a recommendatory nature on the "procedural" obligations of preventing transboundary harm (i.e., the obligations of notification, information and consultation). On the other hand, opinions in the Commission were divided on whether "unilateral measures of prevention" (i.e., the legal administrative and judicial actions) to oblige private operators to adopt the best preventive technology should constitute an obligation or a mere recommendation. Unilateral preventive obligations would be imposed on States, while private operators would be held liable for damage caused regardless of any preventive measures they might have taken. In the opinion of the Special Rapporteur, sending the articles dealing with both substantive and procedural preventive rules to an annex would be practical for at least two reasons. It would resolve the inconsistency some members found in having binding obligations of prevention in this topic, since breach of such obligations

would entail State responsibility. It also did not involve the States directly which would have raised additional issues to be resolved such as for example the immunity of a State from jurisdiction in courts of another State. This approach was also consistent with the current treaty practice in which treaties on liability did not deal with preventive measures. Under those conventions the operators were liable for damage they had caused, irrespective of any measures of prevention which they had adopted. He had, however, not closed the option. If the prevailing opinion was that there must be unilateral preventive obligations separate and independent from recommendatory procedural obligations dealing with prevention, article 1 that he proposed in his eighth report could be moved from the annex, where it was now, to the main body of the text. The only way that, in his view, the obligations of prevention and reparation could both exist in the same instrument was by attributing responsibility to different acts or to different subjects (e.g., responsibility of the State for prevention, and civil liability for reparation).

284. Whatever the nature of the articles on prevention, the Commission would still have to examine whether the rules of prevention in respect of activities with a risk of transboundary harm would differ from those in respect of activities causing such harm. In his view both types of activities involved similar rules of prevention. Such rules, he explained, were normally formulated in terms of legislative, administrative and enforcement measures which States should take. Minor differences between the preventive obligations of the two types of activities could be dealt with within the same set of articles as he had tried to do in the report.

(a) General comments

285. Many members addressed some general issues bearing on the conceptual framework, the scope and the approach to the topic.

286. Commenting on the slow progress by the Commission on this topic, some members suggested that the Commission should consider tackling the topic differently. They felt that it was vital to agree on the point at which the Commission's work should begin and the order which it should follow. The issues involved in the topic were too complex and neither the concept of fault nor of strict liability provided the exclusive key. It was an area in which

fault and strict liability seemed to overlap to a certain degree. Perhaps the area covered by the topic should be broken down into different segments to enable the Commission to tackle the problems one by one, on the understanding that it would endeavour to cover all aspects of the problem in due course.

287. In the opinion of some members, an early decision by the Commission on drafting guidelines or formulating statements of principles would be helpful in filling an apparent conceptual vacuum in the topic and in assisting the Commission to reach more quickly a consensus on the substance of the articles. The Commission, for example, could limit itself to drafting a set of principles on the rights and responsibilities of States with respect to the use of territories, areas or objects under their jurisdiction or control. The Stockholm and Rio Declarations could serve as starting-points. The Commission could improve upon these declarations and give appropriate legal form to discussions that had taken place in forums with a predominantly political outlook. But the suggestion on making an early decision on the form of the eventual instrument which this topic would take was found by other members of the Commission to be neither prudent nor the solution to date. For the discussions on this particular point see paragraphs 292 to 294 below.

288. As regards the conceptual framework of the topic, some members commented that an absence of a clear-cut division between this topic and State responsibility may have contributed to the Commission's difficulty in formulating a generally acceptable theoretical basis for the topic. Theoretically, it was difficult to conceive of a legal regime where it would be lawful to inflict harm on someone provided that compensation was paid. There were, of course, cases of compensation for lawful acts such as nationalization. One could also conceive of cases where compensation could be paid for activities whose wrongfulness was precluded on grounds such as force majeure, distress, state of necessity, etc. The latter example belonged to the realm of State responsibility. On this point, it was suggested that the issues covered by this topic may also be addressed differently, namely, in terms of whether, in respect of these activities, States were under an obligation to ensure that no extraterritorial harm was caused or under an obligation to exercise due diligence in the conduct of their activities. The approach taken by the Commission, namely to include both rules of prevention

and of liability, seemed to contradict the title of the topic which dealt only with liability. According to this view, legal instruments concerned with liability normally did not include any rules on prevention. The Convention on International Liability for Damage Caused by Space Objects was mentioned as an example.

289. It was also suggested that the concept of "international liability" should be clarified as regards both general theory and the questions whether liability ensue out of the risk posed or the transboundary harm caused. It was also commented during the discussion that the notion of liability was not distinguished from responsibility in a number of national legal systems, even in a linguistic sense, thus making for additional problems in work on the subject. Some members resisted establishing a rigid regime of strict liability; any regime of liability should be able to take account of factors such as reasonableness, due diligence, the balance of interests, equity and the need not to hinder scientific progress or economic development. At the same time, any system of liability should provide for compensation for innocent victims. Any liability regime should also take account of external intervening factors, such as acts of sabotage and war, where liability was normally shifted from the operator or the State to those responsible for the act concerned. It was also suggested that a limit had to be set to the liability of the operators or the State; at the same time, supplementary means of funding should be foreseen to ensure justice and equity to innocent victims.

290. Some views were expressed in support of a civil liability regime where operators had to bear the costs for the harm they caused. That obligation was equivalent to the so-called "polluter pays" principle in the environmental context. Some members felt that the topic should be limited only to the liability of the operators; otherwise the developing States would be put in a disadvantageous position. Other members found the best solution to involve incorporating an effective international insurance scheme in the liability regime, according to which the innocent victims were guaranteed compensation without creating tension between States by forcing them to negotiate with each other for compensation.

291. It was, however, generally agreed that at a time when the entire world was launching an offensive against environmental degradation, the Commission had a major role to play and must not miss its chance to make an enlightened contribution, within the scope of its mandate. The task of the Commission was not only delicate and complex, but also vital, for the world was encountering technological advances, some of which also had severe environmental consequences, all in a context marked by the economic needs of both developed and developing States. Successful work on this topic would benefit all States and constitute a major contribution to the progressive development of international law and its codification.

(b) The nature of the instrument to be drafted

292. The issue of the eventual form of the instrument to be drafted by the Commission on this topic was discussed by many members. Two views emerged. One view advocated an early decision by the Commission on the nature of the instrument being drafted. The other view advised against an early, hasty decision on such an important question.

293. Those members holding the first view, while admitting that it was not the normal practice of the Commission to make such a decision so early and in advance of the completion of its work on a topic, thought such a decision would be prudent in respect of this topic. They referred to the extraordinary complexity of the topic and the fact that the Commission stood at the outer edge of the progressive development of the law. These reasons, together with the magnitude of the problems experienced by the Commission in the last decade, they felt, required an innovative approach on the part of the Commission in order to overcome the problem. They believed an early decision by the Commission to the effect that the provisions on this topic would be in the nature of a declaration or statement of principles would be most helpful in allowing formation of a consensus on the substance of the articles to be drafted. It would be difficult to reach any consensus on the substance of the articles if these articles were intended to become part of a treaty and impose binding obligations on States. In their view, a decision by the Commission to prepare a statement of principles on this topic would not diminish the value

of the topic. They mentioned the positive experience of the United Nations in the area of human rights which began by drafting a declaration. The remark was made on the other hand, that, inasmuch as the preventive obligations of States were well established in international law, it would be preferable to elaborate a treaty on this subject.

294. Those members who held the other view invoked the normal practice of the Commission of deferring any final decision on the nature of the instrument that would eventually emerge from the work of the Commission on a particular topic until the completion of the work. They did not agree that an early decision on this matter would either substantially reduce the complexity of the topic or would guarantee its rapid progress by the Commission. Though some of the members expressing this view indicated that, at the moment, they felt that an instrument of a recommendatory nature might be more appropriate, they did not wish to make a final decision at this time.

(c) Prevention

295. Several members commented on the Special Rapporteur's request to express their views on whether the articles on prevention should be placed in an annex and presented as a recommendation. Many of them believed that the rules of prevention constituted an important part of the topic, but they did not wish to make a decision at this time as to whether they should be recommendatory or binding. Several members, however, felt that the articles on prevention should remain recommendatory; all the other articles should be cast as recommendations as well.

296. It was recalled that, in the last session of the Commission, the main trend of views appeared to be in favour of only recommendatory procedural obligations on prevention. However, the revised version of articles on prevention were no longer purely procedural and had considerable substantive elements as well. Several members were, therefore, not convinced that preventive rules should be placed in an annex, separated from the main body of texts, or that their character should remain recommendatory. They noted the Special Rapporteur's concerns. But they were not convinced that these concerns were sufficient to dismiss the idea of formulating rules imposing an

obligation on States to prevent the transboundary harm of activities conducted in their territory or under their jurisdiction. In view of the absence of any real progress in formulating substantive rules on liability for harm caused by activities not prohibited, the formulation of a body of rules on the problem of prevention might meet, at least, some of the needs of the international community. They felt that the duty to make reparation, in any case, should not be subordinate to the obligation of prevention, for duty to make reparation was based on the principle of equity whereby an innocent victim should not be left to bear the loss alone.

297. The remark was made that there was a well-established principle of general international law that States were bound to be vigilant in limiting or, if possible, preventing significant transboundary harm caused by supposedly lawful activities. It was noted that the Special Rapporteur was reluctant to subscribe to that view since it would create methodological problems by shifting the ground from lawful activities to wrongful acts. But, even if the Commission confined itself to lawful activities, it would still have to decide at what point they ceased to be lawful. This issue could only be decided by determining what were the obligations of a State to prevent harm emanating from those activities. That made the preventive obligations the true hard core of the topic. Therefore, they could not remain only as recommendations.

298. Some other members felt that all the articles on this topic should be of a recommendatory nature. But even leaving aside the issue of the final form of the draft articles, they felt that the articles on prevention should not be binding. They agreed with the Special Rapporteur that binding preventive obligations would dilute the differences between State responsibility and this topic. They thought that in an ideal situation, where relations among States were relatively stable and harmonious, the provisions set forth by the Special Rapporteur would probably work smoothly. But relations between the States concerned in the situations covered by this topic may be less than ideal, in which event possibilities of effective consultations, not to mention peaceful

settlement of disputes, would be remote. Therefore, in terms of the protection of the innocent victim, the best alternative would involve some insurance scheme to cover damage caused as the result of such activities.

299. Comments were also made on other aspects of the rules on prevention.

300. The Special Rapporteur's view that international law prohibited, in principle, activities that caused significant transboundary harm, in the view of some members, implied that such activities could only be conducted with the consent of the potentially injured State. That meant that prior consent would then be no more than a circumstance precluding wrongfulness within the meaning of article 29 of Part One of the draft articles on State responsibility. Such an assumption could make it more difficult to keep the two topics separate.

301. Various views were expressed regarding extending the concept of prevention to include measures taken after the occurrence of harm in order to minimize the effect of the harm. In the opinion of some members, measures taken after the occurrence of harm were not technically of a preventive character, but were taken to mitigate harm and should be referred to as such. Some other members, however, fully agreed with the Special Rapporteur's broader notion of prevention. They felt prevention had two aspects: to prevent the occurrence of significant harm and, when an accident had occurred, to avoid a multiplier effect. They detected a trend, in recent years, toward broadening the scope of the concept of prevention. The United Nations Convention on the Law of the Sea was given as an example, where references were made to prevention, reduction and control of pollution of the marine environment. In some respects, provisions on prevention had been designed not to prevent altogether the harmful effect of an activity, but to limit the extent of the harm caused.

302. The comment was also made that the concept of prevention was a relative notion and depended on the technology available to a particular State. In some circumstances, it might be impossible even to forecast the consequences of a particular activity. Obviously, in such situations, no preventive measures could be taken.

(d) Comments on specific articles

(i) Article 1. Preventive measures 67/

303. This article sets out the first duty of the State in respect of activities that risk causing or activities causing transboundary harm. Under this article, a State is under a duty to assess the potential transboundary harm of any activity falling within the scope of the topic. Article 1 establishes a basic principle: activities having a risk of causing or activities causing transboundary harm require the prior authorization of the State under whose jurisdiction or control they are to be carried out. If a State discovers that one of such activities is being undertaken under its jurisdiction or control without its authorization, it should assess the impact of the activity and insist on the need for prior authorization. The phrase "best available technology" is borrowed from the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (E/ECE/1225) elaborated under the auspices of the Economic Commission for Europe.

304. The views of members on this article divided into two broad categories: one finding the article superfluous, and the other supporting its retention.

67/ Article 1 read as follows:

"Article 1

Preventive measures

The activities referred to in article 1 of the main text should require the prior authorization of the State under whose jurisdiction or control they are to be carried out. Before authorizing or undertaking any such activity, the State should arrange for an assessment of any transboundary harm it might cause, and should ensure, by adopting legislative, administrative and enforcement measures, that the persons responsible for conducting the activity apply the best available technology to prevent or to minimize the risk of significant transboundary harm, as appropriate."

Document A/CN.4/443, p. 21.

305. According to the first view, article 1 stated the obvious. Activities of the kind covered by the topic also posed threats to the environment, life and property in the territory of the State of origin itself. Because of these possible domestic ramifications, States normally permitted undertaking such activities within their territory only with their prior authorization. Such authorization would normally be granted only after making a careful assessment of the socio-economic as well as environmental impacts of those activities. Proponents of this view found further difficulties with article 1. First, the requirement of States adopting special legislative, administrative or enforcement measures interfered with the internal affairs of States. It should be left to States to decide how to implement the obligations they had undertaken. Secondly, because it was not always possible to assess correctly the transboundary impact of some activities, it was inappropriate to impose such an impossible task on the States.

306. According to the view supporting the retention of article 1, the obligation imposed on States by that article made good sense. It was only fair to require States to allow activities that had the potential of causing transboundary harm to be conducted only after reviewing their environmental impact assessment. The permit to conduct such activities should not be viewed as wholly an internal matter.

307. Several suggestions were made to improve the article. For example, since the main idea was the assessment of the transboundary impacts of activities, the article could be more appropriately entitled "assessment". The article could be divided into subparagraphs, each elaborating on the various issues with which it dealt. The article should also deal with the effect of an insurance system. Insurance should not be viewed as a system limited to securing reparation. The obligation to carry insurance for activities covered under this topic would have an indirect effect on prevention, by forcing the operators to reduce the chances of causing harm in order to keep their insurance premium low. States should withhold authorization until the operators had obtained insurance.

(ii) Article 2. Notification and information 68/

308. Article 2 requires notification and information to States that might be affected by transboundary harm. The Special Rapporteur was of the view that information was closely linked to notification and consultation. This article, he believed, did not impose an unreasonable burden on the State; since information did not entail an additional effort to investigate beyond what the State had already done. The word "available" was used to convey that idea. The State of origin was required to give what it had; it was not under an obligation to make more inquiries than the ones it had already conducted. If it proved difficult to discern the extent of the probable effects of the activity, the State of origin should seek the assistance of an international organization with competence in the area.

309. Two different views were expressed about the main thrust of the article.

310. According to one view, article 2 stipulated a duty to inform those who might be harmed by the consequences of one's activities, a principle which already existed in internal law. Those members supporting article 2, agreed with the Special Rapporteur that the duty to inform was closely linked to the

---

68/ Article 2 read as follows:

"Article 2

Notification and information

If the assessment referred to in the preceding article indicates the certainty or the probability of significant transboundary harm, the State of origin should notify the States presumed to be affected regarding this situation and should transmit to them the available technical information in support of its assessment. If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected, the State of origin should seek the assistance of an international organization with competence in that area in identifying the affected States."

Ibid., p. 22.

duty to notify. It was reasonable to require that the notification and information procedure should be followed in cases where transboundary harm was certain or probable. The article was applicable to both activities involving risk and those with harmful effects. However, preference was expressed for treating these two types of activities separately in respect of measures of prevention. It was suggested that in redrafting article 2, the experience of the many existing conventions on the protection and preservation of the marine environment should also be examined. One member, while supporting the main thrust of article 2, remarked that it would be logical for the potentially affected States to be informed by the State of origin before the latter gave authorization for activities which might affect the former.

311. The other view did not see any useful purpose in article 2 and found it impractical. According to this view, if an activity had a risk of significant transboundary harm, it would be a wrongful act and the State of origin should refrain from doing it anyway. There was therefore no purpose for article 2. The practicality of the article was also doubted, since it would be unreasonable to expect States to refrain from undertaking lawful activities because their assessment of those activities revealed possible transboundary harm.

312. On the requirement that the State of origin should seek the assistance of competent international organizations, one view was that its practicality was doubtful, while under another view such a requirement was most helpful. According to the latter, both regional and international organizations might, in some cases, be in a better position to supply the States, particularly the developing States, with technical and financial assistance in respect of, for example, preventive measures to be adopted. Organizations such as the United Nations Industrial Development Organization, the International Atomic Energy Agency and the Indian Ocean Commission were mentioned as examples of useful international and regional organizations. It was suggested that the provision defining the role of the international organizations might well be modelled on articles 202 and 203 of the United Nations Convention on the Law

of the Sea. The comment was made that this topic should also anticipate preferential treatment for developing States. The most recent international legal instruments dealing with similar issues had also done so 69/ Some members felt that the requirements of notification and information under article 2 should become mandatory.

(iii) Article 3. National security and industrial secrets 70/

313. Article 3 is a safeguard clause permitting the State of origin to withhold information vital to its national security or to the protection of industrial secrets. The article relies on the good faith cooperation by the State of origin with other States in transmitting any information that it could provide depending on the circumstances.

314. A few members commented briefly on this article. They found it useful and a positive element in the draft that might even encourage States to accept the instrument as a whole.

69/ In that context references were made to principle 6 of the Rio Declaration on Environment and Development of 13 June 1992 (A/CONF.151/5/Rev.1) and the Convention on Biological Diversity of 5 June 1992.

70/ Article 3 read as follows:

"Article 3

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin should cooperate in good faith with the other States concerned in providing any information that it is able to provide, depending on the circumstances."

Ibid. p. 23.

(iv) Article 4. Activities with harmful effects: prior consultation [71]

315. Article 4 represents the first instance of a separate provision relating only to activities with harmful effects. These are activities which, in their normal course of operation cause transboundary harm. Where such harm is avoidable, the State of origin is obliged to require the operator to take the necessary preventive measures. Where such harm is unavoidable, no further steps may be taken without some consultation with the affected States. Affected States are permitted to make counterproposals regarding the conduct of the activity.

316. Those members who commented on article 4 found its purpose unclear. According to one view, if the State of origin was aware that an activity was going to have harmful effects, it should refrain from undertaking or authorizing it. According to another view, the planned activity with harmful effects could be very important to the development of the State of origin and that State might not have any other way to reduce or minimize the transboundary harm to its neighbours. In such a situation, there would be no purpose to holding consultations, since such consultations were unlikely to lead to any agreed regime.

---

[71] Article 4 read as follows:

"Article 4

Activities with harmful effects: prior consultation

Before undertaking or authorizing an activity with harmful effects, the State of origin should consult with the affected States with a view to establishing a legal regime for the activity in question that is acceptable to all the parties concerned."

Ibid.

317. It was stated that if the purpose of prior consultations in respect of activities with harmful effects, provided for not only in article 4 but also in articles 5 and 7, were to arrive at an agreed regime which would permit such activities notwithstanding their harmful effects, it should say so clearly. It should also indicate that such prior consultations might involve either modification of the original scheme proposed by the State authorizing the activities or, possibly, even some element of compensation for the interests in other States that would be harmed by those activities. It was also suggested that article 4 should make clear that, in the case of activities whose harm could be avoided, the object of the consultations was to obtain the agreement of the affected State regarding the establishment of an acceptable legal regime of prevention, since the term "consultation" was very often used in cases where there was no obligation to obtain consent. Article 4 should also specify the characteristics of a legal regime for which the consent of the affected States was requested in the case of avoidable harm.

318. Article 4 was found problematic on another ground. It was remarked that if article 4 intended to provide a veto for the affected State in respect of activities with harmful effects, it would cause problems with regard to ensuring a balance between the interests of both States during the consultations. If, however, a veto for the affected State was not contemplated, it would then be difficult to see what the legal effect the article would have in the absence of consent by the affected State to activities whose harm was unavoidable. For these reasons, some members suggested the deletion of article 4.

319. The remark was also made that if the starting point was the idea that activities with harmful effects could be lawful, at least under certain conditions, there was no valid reason for distinguishing between activities with harmful effects and activities involving risk. In both cases, consultations must be held between the State of origin and the potentially affected State or States and draft article 6 would suffice for both kinds, in which case there was no need for article 4.

(v) Article 5. Alternatives to an activity with harmful effects [72]

320. This article is the second article dealing specifically with activities with harmful effects where it becomes clear that transboundary harm is unavoidable under the conditions proposed or that such harm cannot be adequately compensated. In such cases, the potentially affected States may ask the State of origin to request from the operator to put forward alternatives which may make the activity acceptable. This article is an intermediate step between consultations and prohibition.

321. Several members commented on article 5 and expressed difficulties with it for two, almost opposing, reasons. According to one view, the article did not take sufficiently into account the interest of the State of origin, while according to the other view article 5 did not protect the interest of the affected State. For those members who espoused the former view, the article was impractical because it put the State of origin in a helpless situation, and it was also open to abuse by the potentially affected State. Thus article 5 would defeat the purpose of article 8 on peaceful settlement of disputes. Considering that the topic was dealing with lawful activities, it would be sufficient, in such cases, to request the State of origin to reconsider the activity and re-evaluate possible alternatives. But the present wording of article 5 seemed to amount to a prohibition of such activities, since the State of origin was no longer able to decide how those activities were to be conducted or regulated.

---

[72] Article 5 read as follows:

> "Article 5
>
> Alternatives to an activity with harmful effects
>
> If such consultations show that transboundary harm is unavoidable under the conditions proposed for the activity, or that such harm cannot be adequately compensated, the affected State may ask the State of origin to request the party requesting authorization to put forward alternatives which may make the activity acceptable."

Ibid. p. 24.

322. Those members who felt that the article did not sufficiently protect the interest of the affected State pointed to the ineffectiveness of the options that were open to it under the article. They felt that, where transboundary harm was unavoidable or where it was established that such harm could not be adequately compensated, simply authorizing the injured State to request the State of origin to review alternatives was much too mild. The article should state that if the operator was unable to put forward acceptable alternatives the State of origin could not authorize the proposed activities.

(vi) Article 6. Activities involving risk: consultations on a regime [73]

323. Article 6 attempts to address the specific situation of activities involving risk of causing transboundary harm. This article makes clear that one of the main differences between activities with transboundary harmful effects and those with the risk of causing transboundary harm is the purpose of the duty of consultations. Under article 6, the States concerned, if necessary, are to consult in order to determine the amount of potential transboundary harm, any possible modification of the planned activity, or preventive measures or contingency plans in case of harm. Article 6 also provides that liability for any transboundary harm caused will be subject to the articles of the main text of the topic, unless the parties could agree on a special regime for compensation.

---

[73] Article 6 read as follows:

"Article 6

Activities involving risk: consultations on a regime

> In the case of activities involving risk, the States concerned should enter into consultations, if necessary, in order to determine the risk and amount of potential transboundary harm, aiming at arriving at an arrangement with regard to such adjustments and modifications of the planned activity, preventive measures and contingency plans as will give the affected States satisfaction, on the understanding that liability for the harm caused will be subject to the provisions of the corresponding articles of the main text."

Ibid.

324. Few members in their comments addressed article 6. They agreed with the Special Rapporteur that there were two basic issues in approaching the problem of prior consultations. On the one hand, a State should not be able to externalize the costs of, for example, its industrial activities by imposing burdens on the other States while retaining the benefits entirely to itself; and, on the other, neighbouring States should not have a veto over a State's projected activities, provided that appropriate procedures had been followed to minimize the risk of harm. Such an approach was found consistent with the nature of the obligations presently envisaged in the annex. The article should therefore be redrafted to provide a more precise definition of the purpose of consultations as explained in the eighth report of the Special Rapporteur.

(vii) Article 7. Initiative by the affected States 74/

325. This article provides an opportunity for the affected State to take initiatives when it has reason to believe that an activity under the jurisdiction or control of another State is causing it significant harm or creating a risk of causing it such harm. The affected State may request the State of origin to comply with the provisions of article 2 of the Annex. Such a request should be accompanied by a technical explanation, setting forth the reasons for such a belief. If the activity proved to be one of those mentioned in article 1 of the main text, the State of origin should pay for the cost of the study.

74/ Article 7 read as follows:

"Article 7

Initiative by the affected States

If a State has reason to believe that an activity under the jurisdiction or control of another State is causing it significant harm or creating a risk of causing it such harm, it may ask that State to comply with the provisions of article 2 of this Annex. The request should be accompanied by a technical explanation setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1 of the main text, the State of origin should pay compensation for the cost of the study."

Ibid., pp. 24-25.

326. Views expressed on this article indicated general support for the idea underlying it. Members thought it useful to allow a State that was potentially affected by an activity to initiate consultations, both before and after the authorization by the State of origin, and even when the activity in question had already started or damage was becoming apparent. But the right of the potentially affected State to invoke article 2 seemed unhelpful. Instead, the potentially affected State should only be entitled to call for consultations, which would then be carried out as if they had been initiated by the State of origin.

327. The requirement, in the last sentence of article 7, that the State of origin bear the cost of the study, was found unnecessary. Some considered that idea even counter-productive, for it could prevent the parties from achieving an amicable settlement; it also overlooked the fact that the activities in question were assumed lawful. Even if the last sentence of article 7 were to be retained, the question was raised as to whether the distinction drawn in articles 4 and 6 between activities causing harmful effect and those posing risk should determine who should pay for the cost of the study. If the activity belonged to the first category, it would perhaps be reasonable to expect the State of origin to pay the cost of the study. But the same could not be stated in respect of activities with the risk of causing harm.

(viii) Article 8. Settlement of disputes [75]

328. This article was drafted with the view that a speedy resolution of differences between the parties, in respect of matters dealt with in these

---

[75] Article 8 read as follows:

"Article 8

Settlement of disputes

If the consultations held under articles 4 and 6 above do not lead to an agreement, the parties should submit their differences for consideration under the procedures for the settlement of disputes set out in Annex ...".

Ibid., p. 25.

articles, is essential. Article 8 addresses a situation where the State of origin and the affected States cannot resolve their differences through consultation. Procedures for peaceful settlement of disputes will be provided for and will be attached to this part of the articles as an annex.

329. From the comments of those members who spoke on this article, it became clear that many believed that an article of this nature was useful and indeed necessary. Such an article should recall the general obligation of the peaceful settlement of disputes and, if necessary, refer to an annex providing for a particularly flexible and speedy means of settlement. This, in turn, might stimulate more serious consultations. But any procedure for the settlement of disputes should specify precisely under which articles a settlement procedures obligation could be invoked. If the provisions were not mandatory, it would be difficult to institute that type of procedure.

(ix) Article 9. Factors involved in a balance of interests [76]

330. The main purpose of the articles provided in the annex is to provide a framework within which the parties can resolve or reconcile their various interests in undertaking activities with a risk of causing or causing transboundary harm. It is hoped that, within this framework, the parties can

---

[76] Article 9 read as follows:

> "Article 9
>
> Factors involved in a balance of interests
>
> In the case of the consultations referred to above and in order to achieve an equitable balance of interests among the States concerned in relation to the activity in question, these States may take into account the following factors:
>
> (a) Degree of probability of transboundary harm and its possible gravity and extent, and likely incidence of cumulative effects of the activity in the affected States;
>
> (b) The existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;
>
> (c) Possibility of carrying out the activity in other places or with other means, or availability of other alternative activities;

succeed in balancing their various interests. Article 9 introduces factors that could assist the parties themselves or a third party decision-maker in that effort.

331. Two different views were expressed by the members who addressed article 9.

332. According to one view, article 9 was one of the most attractive features of the draft and the concept embodied was extremely helpful. To improve the article further, it was suggested that a distinction should be made between those factors relevant to balancing interests in respect of activities

---

(d) Importance of the activity for the State or origin, taking into account economic, social, safety, health and other similar factors;

(e) Economic viability of the activity in relation to possible means of prevention;

(f) Physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

(g) Standards of protection which the affected State applies to the same or comparable activities, and standards applied in regional or international practice;

(h) Benefits which the State of origin or the affected State derive from the activity;

(i) Extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

(j) Willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

(k) Extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

(l) Extent to which assistance from international organizations is available to the State of origin;

(m) Applicability of relevant principles and norms of international law."

Ibid., pp. 25-26.

involving harm and those in respect of activities posing a risk of causing harm. These two types of activities involve different issues and most likely involve different factors which the parties negotiating should take into account. It was also suggested that the balance of interests test in article 9 should not be limited only to consultations among the States, but should also give due consideration to that balance as possibly constituting an exception to the establishment of prevention regimes, as called for under articles 4 and 6.

333. According to another view, even though it could be important to indicate to States that could serve as the basis for their consultations, it should be made clear that the factors in article 9 were only recommendatory and were provided simply as guidelines for States. Those factors should, therefore, be moved to an annex, to a commentary on one of the articles on consultations, or removed from the draft altogether.

(e) Proposed new definitions for article 2 on the use of terms

334. The Special Rapporteur explained that in the period since article 2 had been referred to the Drafting Committee, further developments had been made outside the Commission in formulating instruments dealing with activities involving risk of causing or causing transboundary harm in respect of certain specific activities. [77] Views in the Commission and in the Sixth Committee also indicated a preference for a more precise definition of risk or even a list of activities to be covered by these articles. For these reasons, he had attempted to provide a clearer definition for risk and for harm for the benefit of the Drafting Committee, where article 2 was pending. The Special Rapporteur indicated that, from a review of the various definitions of risk in the more recent legal instruments, he had concluded that any such definition should take into account three criteria: magnitude of the activity undertaken, location of the activity in relation to areas of special sensitivity or importance (such as wetlands, national parks and sites of

---

[77] Those instruments are listed in ibid., p. 29.

special scientific interest or of archaeological, cultural, or historical importance) and effects of a particular activity on human beings or on the potential use of certain important resources or areas. He therefore proposed another definition of risk for article 2. 78/

335. The Special Rapporteur noted that there had been a number of recent legal instruments where the concept of harm was defined more precisely. Having taken into account those definitions and the views expressed in the Commission as well as in the Sixth Committee, the Special Rapporteur proposed a new definition for the concept of harm. He also recommended further changes in the definition of terms in article 2. 79/

78/ The proposed new definition read as follows:

> "Risk means the combined effect of the probability of occurrence of an accident and the magnitude of the harm threatened. Activities involving risk, for purposes of the present articles, are activities in which the result of the above combination is significant. This situation may arise when the effects of the activity are threatening, as when dangerous technologies, substances, genetically modified organisms or micro-organisms are used, or when major works are undertaken, or when their effects are accentuated by the location of the sites at which they are carried out, or by the conditions, ways or media in which they are conducted."

Ibid.

79/ Further changes in article 2 proposed by the Special Rapporteur read as follows:

A new paragraph will be added to read:

> "'Damage' means: (a) any loss of life, impairment of health or any personal injury; (b) damage to property; (c) detrimental alteration of the environment, provided that the corresponding compensation would comprise, in addition to loss of profit, the cost of reasonable

336. Those members who commented on the new definition of "risk" agreed with its substance but felt that drafting could be improved. They stated that, if the Commission intended to deal at the same time with both activities posing risk and those causing harmful effects, it would be better to define them in separate paragraphs. Some members were uncertain about the use of the qualifying word "significant" as a threshold for risk. It was suggested that determination of "significant risk" might lead to endless discussions. For example, with regard to the peaceful use of nuclear power it was hardly likely that States would take the same view of the probability of an accident, depending on whether reactors were sited in the territory of a State generally known for its advanced technology or in a State known not to be technologically advanced. They found the core of the problem not so much in the magnitude of the risk as in the magnitude of the potential harm. Some other members felt that it was important to set a threshold for risk. They were uncertain as to whether there were clear distinctions among various qualifying terms such as "appreciable", "substantial" or "significant".

---

reinstatement or restorative measures actually taken or to be taken; (d) the cost of preventive measures and additional harm caused by such measures";

paragraph 1 would be replaced by:

"'Restorative measures' means reasonable measures to reinstate or restore damaged or destroyed components of the environment, or to reintroduce, when reasonable, the equivalent of those components into the environment";

paragraph (m) would read:

"'Preventive measures' means reasonable measures taken by any person following the occurrence of an incident to prevent or minimise the damage referred to in paragraph ... of this article";

the concept of a "transboundary harm" is redefined to read:

"the harm which arises in the territory or other areas under the jurisdiction or control of a State as a physical consequence of an activity under article 1 which is conducted under the jurisdiction or control of another State".

Ibid., p. 34.

But in their view the Commission should agree on a threshold, if only to provide a minimum of clarity for the scope of the topic.

337. Some members made comments about the new definition of harm. It was stated that it was difficult to choose among various qualifying words which one should apply to harm in abstract before the Commission decided on the content of the substantive articles. It was noted that the Special Rapporteur had a preference for the definition of harm adopted by the Economic Commission for Europe's Task Force on Responsibility and Liability regarding Transboundary Water Pollution where the affected State was required to take certain measures to mitigate harm (ENVWA/R.45). But that definition was found too subjective; moreover, it did not take sufficent account of the disparities that might exist between the States concerned with regard to environmental standards and their economic situation. Some other members found the choice of the criterion "significant" an acceptable threshold for harm, since it excluded harm that was trivial and minor.

338. Some members expressed views on other aspects of the definition of harm. It was stated, for example, that a detailed definition of harm might not be helpful to judges since it would be too rigid and could hamper their tasks. A detailed definition of harm also had the disadvantage of becoming obsolete because of technological developments, increasing sophistication of industrial activities, and changing attitudes and levels of tolerance towards such matters. Hence a general threshold for harm would be preferable.

339. Some members did not disagree with a detailed definition for harm, but were uncertain about the relevance of the concept of "compensation" in subparagraph (c). Such a reference could imply that what was being defined was not harm but the consequences of harm. It was stated that no society compensated for all harm; in all legal systems, account was taken of the usefulness of the activity causing the harm and the extent and the nature of the damage.

340. As regards the concept of "transboundary harm", comments touched upon two issues. One involved harm to the global commons and the other harm to the territory or the nationals of the State of origin. As regards the first, the

question was raised as to whether the topic would deal with activities causing harm to the global commons. The Special Rapporteur replied that the Commission had not yet made a final decision. If the Commission decided that the topic should apply also to harm caused to the global commons, he would have to make appropriate adjustments to the definition of terms as well as to some aspects of the articles. At present, he had drafted the articles only on the basis of "transboundary" harm. As regards the second issue, the Special Rapporteur agreed with some other members of the Commission that the topic should deal only with transboundary harm since the transboundary element would bring in the element of international law. This topic, as conceptualized, was not intended to apply to domestic harm caused by activities of the State of origin to itself.

2. Decisions by the Commission

341. The Commission, at its 2273rd meeting on 16 June 1992, established a Working Group, open to any member who wished to participate, to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.

342. The Working Group held five meetings from 16 to 23 June 1992.

343. On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992, took the following decisions:

(a) Scope of the topic

344. The Commission noted that, in the last several years of its work on this topic, it has identified the broad area and the outer limits of the topic but has not yet made a final decision on its precise scope. In the view of the Commission, such a decision at this time might be premature. The Commission, however, agreed that, in order to facilitate progress on the subject, it would be prudent to approach its consideration within that broad area in stages and to establish priorities for issues to be covered.

345. Within the understanding set forth in paragraph 344 above, the Commission decided that the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first; only after having completed its work on that first part of the topic

would the Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.

346. Attention should be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm and the Commission should not deal, at this stage, with other activities which in fact cause harm. In view of the recommendation contained in paragraph 345 above, the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it will then decide on the next stage of the work.

(b) The approach to be taken with regard to the nature of the articles or of the instrument to be drafted

347. In the view of the Commission it would be premature to decide at this stage on the nature of either the articles to be drafted or the eventual form of the instrument that will emerge from its work on this topic. It would be prudent to defer such a decision, in accordance with the usual practice of the Commission, until the completion of the work on the topic. The Commission will examine and adopt the articles proposed for this topic, in accordance with its usual practice, on the basis of the merits of the articles, their clarity and utility for the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in this area.

(c) Title of the topic

348. In view of the ambiguity in the title of the topic as to whether it includes "activities" or "acts", the Commission decided to continue with its working hypothesis that the topic deal with "activities" and to defer any formal change of the title, since in the light of the further work on the topic additional changes in the title may be necessary. The Commission will therefore wait until it is prepared to make a final recommendation on the changes in the title.

(d) Recommendation on the report of the Special Rapporteur for the next year

349. The Commission took note with thanks and appreciation of the previous reports of the Special Rapporteur in which the issues of prevention were examined in respect of both activities having a risk of causing and those causing transboundary harm. It requested that the Special Rapporteur, in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect.

CHAPTER V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. The law of the non-navigational uses of international watercourses

350. At its 2292nd meeting, on 22 July 1992, the Commission appointed Mr. Robert Rosenstock as Special Rapporteur for the topic "The law of the non-navigational uses of international watercourses".

351. The Commission wishes to recall that at its 2237th meeting, on 27 June 1991, it decided that, in accordance with articles 16 and 21 of its Statute, the draft articles on this topic provisionally adopted by the Commission on first reading should be transmitted through the Secretary-General to Governments for comments and observations. The Commission also wishes to recall that the General Assembly in paragraph 9 of its resolution 46/54 of 9 December 1991 drew the attention of Governments to the importance for the Commission to hear their views on the draft articles and urged them to present in writing their comments and observations by 1 January 1993, as suggested by the Commission.

352. The Secretary-General, by letter dated 2 December 1991, invited Governments to submit their comments and observations by 1 January 1993. The Commission wishes to emphasize the importance of this deadline for the continuation of its work on the topic.

B. Draft Code of Crimes against the Peace and Security of Mankind

353. The Commission wishes to recall that at its 2241st meeting, on 12 July 1991, it decided that, in accordance with articles 16 and 21 of its Statute, the draft articles on this topic provisionally adopted by the Commission on first reading should be transmitted through the Secretary-General to Governments for comments and observations. The Commission also wishes to recall that the General Assembly in paragraph 9 of its resolution 46/54 addressed to Governments the same appeal, in relation to the present topic, as is reflected in paragraph 351 above.

354. The Secretary-General, by letter dated 2 December 1991, invited Governments to submit their comments and observations by 1 January 1993. Here, too, the Commission wishes to emphasize the importance of this deadline for the continuation of its work on the topic.

C. Relations between States and international organizations (second part of the topic)

355. For the reasons explained in paragraphs 360 to 363 below, the Commission decided not to pursue further, during the present term of office of its members, the consideration of the topic - unless the General Assembly decides otherwise.

D. Programme, procedures and working methods of the Commission, and its documentation

356. At its 2253rd meeting, the Commission noted that in paragraph 6 of resolution 46/54, the General Assembly had requested it

> "(a) To consider thoroughly:
>
> (i) The planning of its activities and programme for the term of office of its members bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics;
>
> (ii) Its methods of work in all their aspects, including the possibility of dividing its annual session into two parts, bearing in mind that the staggering of the consideration of some topics might contribute, *inter alia*, to a more effective consideration of its report in the Sixth Committee;
>
> (b) To continue to pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work."

357. The Commission agreed that this request should be taken up under item 7 of its agenda entitled "Programme, procedures and working methods of the Commission, and its documentation", and that th[illegible] agenda item should be considered in the Planning Group of the Enlarged Bureau.

358. The Planning Group held 11 meetings. It had before it, in addition to the section of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-sixth session entitled "Programme and methods of work of the Commission" (A/CN.4/L.469, paras. 427 to 446), a number of proposals submitted by members of the Commission.

1. Planning of activities

(a) The topic "Relations between States and international organizations (second part of the topic)"

359. The Commission noted that the Planning Group had established a Working Group to review the progress so far achieved on the topic and to make a recommendation as to whether the Commission should continue with it and, in the affirmative, in what direction. The following members had attended the Group's deliberations: Mr. Ahmed Mahiou (Chairman), Mr. John De Saram, Mr. Mehmet Güney, Mr. Kamil Idris, Mr. Vaclav Mikulka, Mr. Robert Rosenstock and Mr. Pemmaraju Sreenivasa Rao.

360. The Commission observed that the discussion of the first part of the topic, dealing with the status, privileges and immunities of representatives of States to international organizations had resulted in draft articles which had formed the basis of the 1975 Convention of the Representation of States in their Relations with International Organizations of a Universal Character. States had been slow to ratify the Convention or adhere to it and doubts had therefore arisen as to the advisability of continuing the work undertaken in 1976 on the second part of the topic, dealing with the status, privileges and immunities of international organizations and their personnel, a matter which seemed to a large extent covered by existing agreements.

361. The passage of time had failed to bring any sign of increased acceptance of the Convention by States and the Commission had not given very active consideration to the topic. Eight reports had been presented by two successive Special Rapporteurs and all of the 22 articles contained therein had been referred to the Drafting Committee, but the Committee had not taken any action on them. Neither in the Commission nor in the Sixth Committee had the view been expressed that the topic should be more actively considered.

362. Under the circumstances and bearing in mind that, in the next few years, the Commission in plenary and the Drafting Committee would be fully occupied with the finalization of draft articles on at least three topics and the preparation of articles on other topics, the Commission, accepting the recommendation of the Planning Group that the topic not be pursued further for the time being, considered it wise to put aside, for the moment, the consideration of a topic which does not seem to respond to a pressing need of

States or international organizations. Therefore, the Commission decided not to pursue further, during the present term of office of its members, the consideration of the topic - unless the General Assembly decides otherwise.

(b) Planning of the activities for the quinquennium

363. The current programme of work consists of the following topics: State responsibility; Draft Code of Crimes against the Peace and Security of Mankind; The law of the non-navigational uses of international watercourses; and International liability for injurious consequences arising out of acts not prohibited by international law. 80/

364. In accordance with paragraph 6 (a) (i) of General Assembly resolution 46/54, the Commission considered extensively the planning of its activities for the term of office of its members. In doing so, it bore in mind, as requested by this resolution, the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics.

365. The Commission agreed that, while the adoption of any rigid schedule would be impracticable, the setting up of goals in planning its activities would be useful.

366. Taking into account the progress of work achieved on the topics in the current programme as well as the state of readiness for making further progress, and bearing in mind the different degrees of complexity of the various topics, the Commission decided that it would endeavour to complete by 1994 the second reading of the draft articles on the law of the non-navigational uses of international watercourses, and by 1996 the second reading of the draft articles on the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. The Commission further intends to make substantial progress on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" and, subject to the General Assembly's approval, to undertake work on one or more new topics.

80/ Having regard to the conclusion reflected in paragraph 362 above concerning the topic "Relations between States and international organizations (second part of the topic)" and subject to any decision of the General Assembly to the contrary.

367. The Commission noted that the Planning Group had prepared for the internal use of the Commission a tentative schedule of the work to be undertaken during each session of the quinquennium in order to achieve the above-mentioned goals, on the understanding that the schedule should be revised each year, in the light of the results achieved in its implementation.

2. Long-term programme of work

368. The Commission noted that the Planning Group had established a Working Group to consider a limited number of topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission. The Group's deliberations had been attended by the following members: Mr. Derek Bowett (Chairman), Mr. Awn Al-Khasawneh, Mr. Mohamed Bennouna, Mr. Peter Kabatsi, Mr. Mochtar Kusuma Atmadja, Mr. Guillaume Pambou-Tchivounda, Mr. Alain Pellet, Mr. Jiuyong Shi, Mr. Alberto Szekely, Mr. Vladlen Vereshchetin and Mr. Chusei Yamada.

369. The Commission endorsed the procedure proposed by the Planning Group, on the recommendation of the Working Group, for the further discharge of the Group's mandate. Under that procedure, designated members of the Commission will prepare a short outline, or explanatory summary, of each of the topics included in a pre-selected list, preferably of four to six pages and of no more than ten pages, to be completed within the next four months. Each outline or explanatory summary will indicate

(a) the major issues raised by the topic;

(b) any applicable treaties, general principles or relevant national legislation or judicial decisions;

(c) existing doctrine;

(d) the advantages and disadvantages of preparing a report, a study or a draft convention if it is decided to proceed with the topic.

The Commission requests the Secretariat (i) to circulate the outlines to all members of the Working Group in November/December 1992, so that comments could be received by January 1993 and (ii) to circulate the comments and the revised outlines to the members of the Working Group and to other authors of outlines prior to the next session. The outlines will be discussed within the Group in May 1993 with a view to reporting to the Planning Group in June 1993.

370. As appears from the above paragraphs, the Commission gave careful consideration to the question of the long-term programme of work. Efforts will be pursued next year with a view to identifying topics which might be recommended to the Assembly for inclusion in the Commission's programme of work.

3. Drafting Committee

371. On the recommendation of the Planning Group, the Commission adopted the following guidelines concerning the composition and working methods of the Drafting Committee:

(1) The Drafting Committee, which shall continue to be a single body, under one Chairman, may have a different membership for its work on each topic.

(2) The Drafting Committee should, as a general rule, concentrate its work on two to three topics at any given session of the Commission, in order to attain greater efficiency.

(3) At the beginning of each session of the Commission, each member may indicate for which topics he would like to serve on the Drafting Committee. The Chairman of the Committee, in consultation with the Bureau of the Commission, shall then recommend the membership for each topic.

(4) The membership for each topic shall be limited to no more than 14 members and shall ensure as far as possible representation of members familiar with the different working languages.

(5) Members of the Commission who are not members of the Drafting Committee for a given topic may attend the meetings and may occasionally be authorized to speak, but restraint is recommended.

(6) During the sessions of the Commission, the Drafting Committee shall be given as much time as needed for the timely performance of the tasks entrusted to it.

(7) When the workload of the Commission indicates the need for a concentrated drafting effort, the Drafting Committee may be given additional time for that purpose, preferably at the beginning of a session.

(8) The Drafting Committee shall present to the Commission a report as early as possible after the conclusion of its consideration of each topic.

372. The Commission further agreed that the first two weeks of its forty-fifth session be entirely devoted to the work of the Drafting Committee on articles of the topic "State responsibility". Arrangements for the implementation of that decision were made during the present session.

4. Report of the Commission to the General Assembly

373. On the recommendation of the Planning Group, the Commission adopted the following guidelines concerning the preparation and content of its report:

(1) The General Rapporteur should play an active part in the preparation of the Commission's report, particularly in seeking coordination and consistency in approach and style between the different parts, which may be drafted by the Special Rapporteurs and the Secretariat.

(2) The General Rapporteur should have particularly in mind that efforts should continue in order to avoid an excessively long report, without prejudice to the inclusion of the essential information needed by the Sixth Committee and by readers interested in the work of the Commission.

(3) The report should include a chapter providing, in summary form, a general view of the work of the session to which it refers, including a list of questions on which the Commission would find the views of the Sixth Committee particularly helpful.

(4) Parts of the report indicating previous work on each topic should continue to be as brief as possible.

(5) The summary of debates should be more compact, giving emphasis to trends of opinions, rather than to a detailed recording of individual views. However, reservations expressed by members on decisions taken by the Commission should be indicated.

(6) When only fragmentary results have been achieved in the consideration of a topic or an issue, and such results can only be properly assessed by the Sixth Committee after further elements have been added, the information contained in the report should be very summary, with the indication that the matter will be more fully presented in a future report.

5. Contribution of the Commission to the Decade of International Law

374. The Commission considered the question of its contribution to the Decade of International Law. One suggestion was to prepare a publication, containing a series of articles contributed by members of the Commission, which would aim

at presenting an overview of the main problems of international law on the eve of the twenty-first century. On the recommendation of the Planning Group, the Commission accepted in principle this suggestion and authorized that preparatory work on this project be immediately undertaken. An informal meeting was accordingly held on 22 July 1992. Before the beginning of the forty-fifth session, a group of members, to be coordinated by Mr. Alain Pellet, will endeavour to draw up a tentative outline of the contents of the suggested publication and at the beginning of that session a Working Group will be established to finalize the outline and to submit a report to the Commission which will take a decision on the project.

375. The same Working Group will also consider other suggestions which have been made or may be made for other possible contributions of the Commission to the Decade, including the holding of symposia or seminars and the possibility of a conference on international Law.

6. Possibility of dividing the Commission's annual session in two parts

376. Resuming discussions already held in previous sessions, and complying with the wishes expressed by the General Assembly in paragraph 6 (a) (ii), of resolution 46/54, the Commission considered the possibility of dividing its annual session in two parts. The administrative and financial implications of such a division were examined on the basis of data contained in a preliminary study prepared by the Secretariat, at the request of the Commission. The Commission came to the conclusion that there would be some administrative and financial problems in the division of the session, but that such problems, although serious, would not be insurmountable. The Commission then considered what should be the main element for a decision: the advantages that might result for the effectiveness of its work if the division was adopted. Arguments were presented aimed at demonstrating that the productivity of the Commission would be improved under a regime of two annual meetings. Arguments against the idea were also analysed. The Commission came to the conclusion that the suggestion of dividing the annual session into two parts had not received enough support at this time, and that improvements in the effectiveness of the work of the Commission should continue, for the time being, to be sought under the present arrangements.

7. Duration of the next session

377. The Commission wishes to reiterate its view that the requirements of the work for the progressive development of international law and its codification and the magnitude and complexity of the subjects on its agenda make it desirable that the usual duration of the session be maintained. The Commission also wishes to emphasize that it made full use of the time and services made available to it during its current session.

E. Cooperation with other bodies

378. The Commission was represented at the January 1992 session of the Asian-African Legal Consultative Committee, in Islamabad, by Mr. Koroma as Chairman of the Commission, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. Frank Njenga and by Mr. Baghwat Singh. Mr. Njenga addressed the Commission at its 2275th meeting on 18 June 1992 and his statement is recorded in the summary record of that meeting.

379. The Commission was represented at the November 1991 meeting of the European Committee on Legal Cooperation, in Strasbourg, by Mr. Gudmundur Eiriksson who attended the meeting as observer for the Commission and addressed the Committee on behalf of the Commission. The European Committee on Legal Cooperation was represented at the present session of the Commission by Ms. Margaret Killerby. Ms. Killerby addressed the Commission at its 2281st meeting on 3 July 1992 and her statement is recorded in the summary record of that meeting.

380. The Inter-American Juridical Committee was represented at the present session by Mr. Villagran Kramer. Mr. Villagran Kramer addressed the Commission at its 2286th meeting on 15 July 1992 and his statement is recorded in the summary record of that meeting.

F. Date and place of the forty-fifth session

381. The Commission agreed that its next session, to be held at the United Nations Office at Geneva, should begin on 3 May 1993 and conclude on 23 July 1993.

G. Representation at the forty-seventh session of the General Assembly

382. The Commission decided that it should be represented at the forty-seventh session of the General Assembly by its Chairman, Mr. Christian Tomuschat. 81/

H. International Law Seminar

383. Pursuant to General Assembly resolution 46/50, the United Nations Office at Geneva organized the twenty-eighth session of the International Law Seminar during the current session of the Commission. The Seminar is intended for post-graduate students of international law and young professors or government officials dealing with questions of international law in the course of their work.

384. A Selection Committee under the chairmanship of Professor Christian Dominicé (The Graduate Institute, Geneva) met on 23 March 1992 and, after having considered some 75 applications for participation in the Seminar, selected 24 candidates of different nationalities, mostly from developing countries. Twenty-one of the selected candidates, as well as four UNITAR fellowship holders, were able to participate in this session of the Seminar. 82/

81/ The Commission deemed it advisable not to request any of its Special Rapporteurs to attend the debate of the Sixth Committee. It considers that it might be appropriate to send more than one of the Special Rapporteurs to a session of the General Assembly later in the current term of office of its members.

82/ The list of participants in the twenty-eighth session of the International Law Seminar is as follows: Mr. Menilik Alemu (Ethiopia); Mr. Dudley Aru (Vanuatu) (UNITAR fellowship holder); Ms. Anuradha Bakshi (India); Mr. Neville Bissember (Guyana); Mr. Ali Bogoreh (Djibouti) (UNITAR fellowship holder); Ms. Merlin Boyce (Trinidad and Tobago); Mr. Andrey Darusenkov (Russia); Ms. Hakim Linggawaty (Indonesia); Mr. Krit Kraichitti (Thailand); Mr. Pieter Kruger (South Africa); Ms. Fatima Mandhu (Zambia); Ms. Ann Marlborough (Ireland); Mr. Juan José Martinez-Morales (Dominican Republic); Mr. Faustin Mbedi (Congo); Mr. Omphemetse Motumise (Botswana) (UNITAR fellowship holder); Ms. Krisztina Nemeth (Hungary); Ms. Bich Thang Nguyen (Vietnam); Ms. Kim Ha Nguyen Thi (Vietnam) (UNITAR fellowship holder); Mr. Pearson Nherere (Zimbabwe); Ms. Consolata Nyiransabimana (Rwanda); Mr. Juan Sandoval Mendiolea (Mexico); Mr. Surya Prasad Subedi (Nepal); Mr. Jean-Marc Thouvenin (France); Mr. Alfonso Velazquez-Argaña (Paraguay); Mr. Jie Yang (China).

385. The session of the Seminar was held at the Palais des Nations from 1 to 19 June 1992 under the direction of Ms. Meike Noll-Wagenfeld, United Nations Office at Geneva. It was opened, in the absence of the Commission's Chairman, by the Director-General of the United Nations Office at Geneva, Mr. Antoine Blanca. During the three weeks of the session, the participants in the Seminar attended the meetings of the International Law Commission and lectures specifically organized for them, and participated in Working Groups.

386. Four Working Groups were created at the initiative of the Chairman of the Commission, which dealt with the following topics: (1) Relationship between the International Criminal Court (ICC) and the Security Council, under the tutorship of Mr. Villagran Kramer; (2) The sources of law to be applied by the ICC, under the tutorship of Mr. Pellet; (3) Initiation of proceedings before the ICC, under the tutorship of Mr. Tomuschat; and (4) Conferment of jurisdiction on the ICC, under the tutorship of Mr. Crawford. Each Working Group elaborated a paper on its topic which was presented orally and a copy of which has been made available to the members of the Commission. The Commission considered this experiment as encouraging and intends to repeat it in the future. Several lectures were given by members of the Commission as follows: Mr. Derek Bowett: "State responsibility"; Mr. Salifou Fomba: "Principles concerning the attitude of States towards terrorism"; Mr. Ahmed Mahiou: "The work of the International Law Commission"; Mr. Vaclav Mikulka: "State succession"; Mr. Jiuyong Shi: "Protection of private investment: bilateral foreign investment agreements"; Mr. Francisco Villagran Kramer: "Human Rights - United Nations and regional organizations". A round-table discussion was held with the participation of Mr. James Crawford and Mr. Doudou Thiam on the International Criminal Court.

387. In addition, lectures were given by staff members of the United Nations Secretariat, namely Ms. Jacqueline Dauchy (Office of Legal Affairs): "The activities of the Codification Division"; Mr. Thomas McCarthy (Centre for Human Rights): "The activities of the Centre for Human Rights"; and Mr. Peter Sand (Secretariat of the United Nations Conference on Environment and Development (UNCED)): "Legal aspects of UNCED".

388. As it has become a tradition for the Seminar, the participants enjoyed the hospitality of the Republic and Canton of Geneva. On that occasion, they were addressed by Mr. E. Bollinger, Chief of Information of the Canton.

389. At the end of the session of the Seminar, Mr. Christian Tomuschat, Chairman of the International Law Commission, and Mr. Antoine Blanca, Director-General of the United Nations Office at Geneva, addressed the participants. Mr. Pearson Nherere addressed the Commission on behalf of the participants. In the course of this brief ceremony, each of the participants was presented with a certificate attesting to his or her participation in the twenty-eighth session of the Seminar.

390. The Seminar is funded by voluntary contributions from Member States and through national fellowship awarded by Governments to their own nationals. The Commission noted with particular appreciation that the Governments of Austria, Denmark, Finland, France, Hungary, Jamaica, Morocco, Sweden, Switzerland and the United Kingdom had made fellowships available, in particular to participants from developing countries through voluntary contributions to the appropriate United Nations assistance programme. With the award of these fellowships it was possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 15 participants and partial fellowship (travel only) could be given to one participant. Thus of the 619 participants, representing 147 nationalities, who have taken part in the Seminar since its inception in 1964, fellowships have been awarded to 324.

391. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. As all the available funds are almost exhausted, the Commission recommends that the General Assembly should again appeal to States

which can do so to make the voluntary contributions that are needed for the holding of the Seminar in 1993 with as broad a participation as possible.

392. The Commission noted with satisfaction that in 1992 full interpretation services had been made available to the Seminar and it expressed the hope that every effort would be made to continue to provide the Seminar at future sessions with the same level of services and facilities despite existing financial constraints.

ANNEX

Report of the Working Group on the question of an international criminal jurisdiction

A. Summary and recommendations

393. General Assembly resolution 46/54 (9 December 1991) asked the Commission to "consider further and analyse the issues raised in its report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter ..."

394. The Commission discussed these issues at its forty-fourth session, within the framework of its discussions on the draft Code of Crimes against the Peace and Security of Mankind, and on the basis of the tenth report of the Special Rapporteur (Mr. Doudou Thiam) (A/CN.4/442). It then established a Working Group on an International Criminal Jurisdiction, chaired by Mr. Abdul Koroma. [83] The mandate of the Working Group was as follows:

> To consider further and analyse the main issues raised in the Commission's Report on the work of its forty-second session concerning the question of an International Criminal Jurisdiction, including proposals for the establishment of an international court or other international criminal trial mechanism. In so doing, the Working Group will take into account the issues raised by the Special Rapporteur in his Ninth Report (Part II) and Tenth Report, in the light of the discussions thereon held at the Commission's past and current sessions. The Working Group will also draft concrete recommendations with regard to the various issues which it will consider and analyse within the framework of its mandate.

---

[83] The members of the Working Group were Mr. Abdul G. Koroma (Chair); Mr. Doudou Thiam *ex officio* (Special Rapporteur on the topic: "Draft Code of Crimes against the Peace and Security of Mankind"); Messrs. Husain M. Al-Baharna, Gaetano Arangio-Ruiz, James R. Crawford, John de Saram, Kamil Idris, Andreas J. Jacovides, Vaclav Mikulka, Alain Pellet, Patrick Lipton Robinson, Robert Rosenstock, Christian Tomuschat, Vladlen Vereshchetin and Francisco Villagrán Kramer. Mr. Thiam acted as Chair of the Working Group for several meetings, in Mr. Koroma's absence.

395. The Working Group held 16 meetings, at which draft papers prepared by some members of the Group were extensively discussed and revised. The Working Group proceeded throughout on the basis that it was necessary to draft "concrete recommendations", and thereby to assist the Commission in discharging the mandate of the General Assembly referred to in paragraph 393.

396. Since the Commission now seeks to go beyond the analysis and exploration of possible options and to adopt "concrete recommendations", it was necessary for the Working Group to agree on the basic approach to be adopted in its Report. The Working Group agreed on a number of basic propositions which form the basis of its report to the Commission. They are as follows:

(i) An international criminal court should be established by a Statute in the form of a treaty agreed to by States parties;

(ii) In the first phase of its operations, at least, a court should exercise jurisdiction only over private persons, as distinct from States; 84/

(iii) The court's jurisdiction should be limited to crimes of an international character defined in specified international treaties in force. This should include the crimes defined in the draft Code of Crimes against the Peace and Security of Mankind (upon its adoption and entry into force). But it should not be limited to the Code. A State should be able to become a party to the Statute without thereby becoming a party to the Code; 85/

84/ This is consistent with the approach taken by the Commission in relation to the draft code of Crimes against the peace and security of mankind, hereinafter "draft Code of Crimes". See Report of the Commission on the work of its thirty-sixth session, Official Records of the General Assembly, Thirty-ninth session, Supplement No. 10 (A/39/10) para. 65. See also article 3 of the Draft Code of Crimes as provisionally adopted on first reading by the Commission in 1991.

85/ This leaves open the question whether any of the offences defined in the Code should be exclusively within the competence of an international criminal jurisdiction. Some members of the Working Group, at least, believe that the Code is inconceivable without an international criminal jurisdiction, and that it would be desirable, if not essential, to provide that a State party to the Code would thereby accept *ipso facto* the Statute of a court.

(iv) The court would be essentially a facility for States parties to its Statute (and also, on defined terms, other States). In the first phase of its operations, at least, it should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the Statute is obliged to accept ipso facto and without further agreement;

(v) In the first phase of its operations, at least, the court would not be a standing full-time body. On the other hand, its constituent instrument should not be a mere draft or proposal, which would have to be agreed on before the institution could operate. Thus the Statute should create an available legal mechanism which can be called into operation when and as soon as required;

(vi) Other mechanisms were suggested and considered, as reflected in Part B (paras. 473-487) of this Report;

(vii) Whatever the precise structure of the court or other mechanism, it must guarantee due process, independence and impartiality in its procedures.

397. These propositions form the basis for the Report which is attached, and which contains "concrete recommendations" with regard to the various issues which the Working Group has considered and analysed within the framework of its mandate, and in some cases more detailed discussion of various options. The Working Group believes that a structure for an international criminal court, along the lines suggested in the attached Report, could be a workable system. It believes that it could be an appropriate basis for the initial establishment of an international criminal court, if this is judged to be opportune. In that sense, it reiterates the Commission's earlier conclusions (in 1950 and again in 1990) that such a body is possible.

398. Certain members of the Working Group continue to have doubts about whether even a comparatively modest and flexible system of the kind suggested would serve a useful purpose. In their view, the system of prosecution and trial of accused persons before national courts is the only realistic method of the administration of criminal justice. One member, in particular, believes that it is sufficient at this stage for the envisaged international

trial system to be elaborated as a draft text for use by particular States when required; at this point it could be established by bilateral treaty or even by resolution of a competent international organization.

399. Other members of the Working Group would have preferred to go even further, favouring a more extensive system, including a court with compulsory and exclusive jurisdiction over certain offences. But they are prepared to accept the proposal outlined in this Report, on the basis that the proposed mechanism can at least be given the chance to establish itself, and to prove its utility, after which additions to its jurisdiction and powers may prove easier to achieve and more acceptable to States.

400. Whatever differences exist in this regard, there is no disagreement on one essential point. The Working Group believes that the phase of preliminary consideration and analysis, called for by the General Assembly in 1989, is completed. It is now for the General Assembly and for Member States to resolve whether the Commission should proceed to the detailed work that will be required in drawing up a Statute and associated rules of procedure for an international criminal jurisdiction, on the general basis outlined here, or on some other basis.

401. The Working Group accordingly recommends to the Commission:

(i) That it accept the attached Report in discharge of the mandate of the Working Group;

(ii) That it endorse the basic propositions enumerated in paragraph 396 above, on which the Working Group has proceeded, and the broad approach to the question of "an international criminal court or other international criminal trial mechanism" which is set out in the Report;

(iii) That it report to the Assembly:

(a) that, following the ninth and tenth reports of the Special Rapporteur on the topic of the draft Code of Crimes against the Peace and Security of Mankind and the debates thereon in plenary, and through the Report of the Working Group (which would be an Annex to the Commission's Report), it has completed the task of analysis of "the question of establishing an international criminal court or other international criminal trial mechanism" entrusted to it by the General Assembly in 1989;

(b) that its more detailed study confirms the view, expressed earlier by the Commission, that a structure along the lines of that suggested in the Working Group's Report would be a workable system;

(c) that further work on the issue requires a renewed mandate from the Assembly, and needs to take the form not of still further general or exploratory studies, but of a detailed project, in the form of a Draft Statute; and

(d) that it now is a matter for the Assembly to decide whether the Commission should undertake a new project for an international criminal jurisdiction, and on what basis.

B. In extenso report

1. Introduction

402. The General Assembly, in its resolution 46/54 (9 December 1991):

> *Taking note* with appreciation of the section of the report of the International Law Commission concerning the question of the possible establishment of an international criminal jurisdiction, and noting the debate in the Sixth Committee pertaining to this topic...
>
> 3. *Invite[d]* the International Law Commission, within the framework of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter ...

403. The General Assembly's invitation, in paragraph 3 of resolution 46/54, has a considerable history behind it. This goes back to 1948, when the Assembly invited the Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international convention". [86]/ In 1950 the Commission concluded, after its initial study of the question, that the establishment of an international criminal court was both "desirable" and "possible". [87]/ Thereafter the issue was dealt with by several ad hoc committees, which produced and revised a draft statute for an international criminal court. [88]/ Consideration of a draft statute was, however, deferred until some conclusion could be reached on the pending issues of the definition of aggression and the draft code of offences against the peace and security of mankind.

---

[86]/ See General Assembly resolution 260 B (III), 9 December 1948. The history is fully described in *Official Records of the General Assembly, Forty-fifth session, Supplement No. 10*, (A/45/10), paras. 96-100, 103-115.

[87]/ *Yearbook of the International Law Commission 1950*, vol. II, Report to the General Assembly, paras. 128-145; cf also *Yearbook ... 1949*, Report to the General Assembly, paras. 32-34.

[88]/ Documents A/2136 (1951) and A/2645 (1954).

404. In 1989, in the changing international climate, the General Assembly again specifically requested the Commission...

> when considering... the item entitled "Draft Code of Crimes against the Peace and Security of Mankind", to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code of crimes, including persons engaged in illicit drug trafficking in narcotic drugs across national frontiers ... 89/

The specific reference to international drug trafficking was the result of a proposal from Trinidad and Tobago, which had called for an international court or other mechanism to assist States in dealing, *inter alia*, with that problem. 90/

405. In response to this request, the Commission at its forty-second session in 1990 gave extensive consideration to the issue, within the context of its work on the draft Code of Crimes. After a general debate, a Working Group was established whose report, after adoption by the Commission, was incorporated in the Commission's report to the General Assembly. 91/ The report surveyed various issues involved in the creation of an international criminal court (jurisdiction and competence *ratione materiae* and *ratione personae*; whether it should have exclusive, concurrent or only review jurisdiction; the submission of cases; institutional structure; composition; mode of prosecution; legal force and implementation of judgements, and the financing of the court). In its survey of these issues, the Commission did not indicate any preference for one particular solution over another. However, the report did record that the Commission had reached ...

> a broad agreement, in principle, on the desirability of the establishment of a permanent international criminal court to be brought into relationship with the United Nations system, though different views were expressed as to the structure and scope of jurisdiction of such a court. 92/

89/ General Assembly resolution 44/39, 4 December 1989, para. 1.

90/ Document A/44/195 (1989).

91/ Document A/45/10 (1990), paras. 93-157.

92/ Ibid., para. 155.

406. These "different views" involved the choice between three very different models of criminal jurisdiction: (a) a court with exclusive jurisdiction over specified crimes, (b) a court having concurrent jurisdiction with national courts, and (c) a court having only a review competence. The three models were presented for discussion by the General Assembly, without the Commission indicating any preference between them. 93/

407. The Commission returned to the question during its forty-third session (1991), when it had the assistance of an examination of certain issues by the Special Rapporteur on the draft Code of Crimes, Mr. Doudou Thiam, in Part II of his ninth report. 94/ In that report the Special Rapporteur pointed out that the Commission had not been asked by the General Assembly to draft a Statute for an international criminal court, and that the Assembly had as yet expressed no preference for any of the three models of an international criminal jurisdiction. Nor had it expressed any preference for any version of an international criminal jurisdiction over the present system based on national courts with universal jurisdiction over certain offences of an international character. None the less, he raised two issues in the form of draft articles. These dealt with the jurisdiction of the proposed court and the requirements for the institution of proceedings. The Special Rapporteur did this not with a view to having the draft articles submitted to the Drafting Committee, as part of a project to draft a Statute for an international criminal court, but in order to stimulate and clarify debate on the underlying question of the "possibility" of an international criminal court - essentially the same question that had been asked of the Commission by the Assembly in 1948. During the debate, members of the Commission expressed a wide range of views on the suggested draft articles. 95/

93/ Ibid., paras. 156-157.

94/ A/CN.4/435/Corr.1 and Add.1/Corr.1.

95/ For a summary of the debate see Official Records of the General Assembly, forty-sixth session, Supplement No. 10, (A/46/10), paras. 106-175. The Commission noted that it would "continue at forthcoming sessions" to consider the issue of an international criminal court or other international criminal trial mechanism: ibid., para. 175.

408. The issues were also canvassed by the Sixth Committee in its debate on the Commission's reports on its forty-second and forty-third sessions but without any conclusion being reached, or any clear preference emerging between the possible models outlined by the Commission in 1990. 96/ That position is reflected in the language of General Assembly resolution 46/54, with its call for further analysis and consideration of the issue (see para. 402, above).

409. An important stage in the Commission's work was reached in 1991 with the adoption on first reading of draft articles on the draft Code of Crimes against the Peace and Security of Mankind. As adopted, that draft Code is intended to be applied by national courts, but article 6 (which deals with the obligation on States parties to try or extradite persons accused of crimes against the peace and security of mankind) provides:

> 3. The provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court.

Article 9, which elaborates on the principle *non bis in idem*, also contemplates the possible establishment of an international criminal court.

410. The Special Rapporteur's tenth report (A/CN.4/442) discussed in some further detail the issue of the possible establishment of an international criminal jurisdiction. Part I (paras. 7-20) dealt with certain objections to such a jurisdiction. Part II (paras. 21-86) went on to consider certain specific issues which would arise in the course of establishing such a jurisdiction. These were as follows: (1) the law to be applied (paras. 21-46); (2) the jurisdiction of the court *ratione materiae* (paras. 47-56); (3) complaints before the court (paras. 57-66); (4) proceedings relating to compensation (paras. 67-75); (5) the "rendition" of an accused person to the court and its relationship to extradition (paras. 76-83); and (6) the question of appeals (under the heading

---

96/ For the 1990 Sixth Committee debate, see *Topical Summary ... prepared by the Secretariat* (A/CN.4/L.456) paras. 119-186. For the 1991 debate, see, *Topical Summary ... prepared by the Secretariat* (A/CN.4/L.469) paras. 217-255.

of "the double-hearing principle") (paras. 84-86). A number of draft proposals were put forward, again with the intention of stimulating debate, and not in order that these should be referred to the Drafting Committee.

411. These proposals were discussed by the Commission during the first three weeks of the session, and met with a diverse response. It is not necessary to summarize the debate here, except to say that the proposal for the court to have exclusive jurisdiction over a range of offences 97/ proved controversial (although it was not without supporters). As in previous years, there were some who were opposed to any version of an international criminal jurisdiction at all, while others favoured a permanent full-time court with extensive jurisdiction over the crimes defined in the draft Code of Crimes, and possibly other international offences. But there was a substantial body of opinion within the Commission which favoured exploring a more flexible and limited trial system. 98/ This could be available to States in situations where it was needed, but would require neither an extensive prior commitment on the part of States, nor an expensive new structure to be established by the United Nations.

412. Following the discussion of the Special Rapporteur's tenth report in plenary, it was decided to set up a Working Group on an International Criminal Jurisdiction, chaired by Mr. Abdul Koroma. 99/ The mandate of the working group was as follows:

> To consider further and analyse the main issues raised in the Commission's report on the work of its forty-second session concerning the question of an International Criminal Jurisdiction, including

---

97/ Specifically, the offences over which exclusive jurisdiction was contemplated were genocide, systematic or mass violations of human rights, apartheid, illicit international drug trafficking, seizure of aircraft and kidnapping of diplomats or internationally protected persons: see document A/CN.4/442, para. 47.

98/ By contrast there was little support for the third option canvassed in the 1990 report, an international court with powers of review over national courts. See para. 423 below.

99/ For the composition of the Working Group see footnote 83 above.

proposals for the establishment of an international court or other international criminal trial mechanism. In so doing, the Working Group will take into account the issues raised by the Special Rapporteur in his ninth report (Part II) and tenth report, in the light of the discussions thereon held at the Commission's past and current sessions. The Working Group will also draft concrete recommendations with regard to the various issues which it will consider and analyse within the framework of its mandate.

413. The Working Group at its first meeting agreed that it was necessary to give a direct answer to the question whether the establishment of an "international criminal court or other international criminal trial mechanism" was "possible". 100/ The Commission had, in the report on its forty-second session and through the successive reports of the Special Rapporteur, provided an extensive discussion of the issues, without committing itself to the feasibility or desirability of particular solutions. It was time to go further. But the question of the possibility of a court or other international trial mechanism could not be answered in the abstract. It required an analysis of certain major questions which had to be resolved before the creation of such a court or mechanism could be contemplated, and an indication of the preferred approach to these issues. Only in that way could the Commission respond adequately to the General Assembly, and the Assembly thereby be put in a position to provide guidance to Member States in their subsequent discussion of the matter.

414. The Working Group thus concluded that its report should first outline the basic arguments which have been made in favour of some kind of court or other mechanism, and that it should then proceed to analyse the more important

---

100/ Mr. Thiam, the Special Rapporteur on the topic draft Code of Crimes, defined "possibilité" for this purpose as requiring the Working Group to examine the various objections made to an international criminal court or other mechanism and to show "qu'il n'y a pas des difficultés insurmontables au plan juridique". He distinguished this from the question of "opportunité": the judgement whether such a court or other mechanism is "opportun" is not a matter for the Commission, but a matter for the political judgement of the Members of the General Assembly. The Working Group agrees with this elaboration of its task.

specific issues that have to be faced before such a body could be created. The Working Group initially identified five "clusters" of specific issues of this kind, which were as follows:

(1) the basic structure of a court or of the other options for an "international trial mechanism"; 101/

(2) the system of bringing complaints and of prosecuting alleged offenders;

(3) the relationship of the court to the United Nations system, and especially to the Security Council;

(4) the applicable law and procedure, and especially the issue of ensuring due process to accused persons;

(5) how to bring defendants before a court; the relationship between this process and extradition; international judicial assistance to proceedings before a court; and the implementation of sentences.

Papers were prepared by members of the Working Group on each of these "clusters", and in addition some members of the Working Group provided short papers on specific issues.

415. As work proceeded, relationships between issues in the different "clusters" became clearer, and it emerged that internal sub-categorization of issues was a rather artificial exercise. Accordingly this Report seeks to deal sequentially with the basic issues identified by the Working Group, and to provide enough by way of an indication of its preferred approach, or of possible alternatives. A balance has had to be struck: the Report seeks to give a sufficient indication of possible solutions, without going into excessive detail, or dealing with particular points which are not essential to any overall scheme. In some cases the Working Group has done no more than outline the range of solutions, without indicating a preference for one over another. The aim throughout has been to provide enough information and argument to enable a judgement to be made as to whether and how to proceed.

101/ In this report, the term "court" also includes other forms of international criminal trial mechanism. The range of possibilities raised by the term "international criminal trial mechanism" is discussed in Section 4 (paras. 473-487 below).

416. Thus this Report begins with an outline of the basic arguments which underlie calls for an international criminal court (Section 2). Sections 3-6 then deal in turn with various categories of issues, as follows: Section 3 deals with structural and jurisdictional issues; Section 4 with the question of an "international criminal trial mechanism" other than a court; Section 5 with questions of applicable law, penalties and due process; and Section 6 with the issues involved in bringing defendants before the court.

2. General arguments relating to an international criminal court

417. In any consideration of this issue, it is necessary to start with the fact that the normal and natural venue for criminal trials of individuals has always been the criminal trial courts of States. The extensive system of international treaties dealing with crimes of an international character (war crimes, aircraft hijacking, terrorism, hostage-taking, etc) proceeds on this basis. With hardly any exception, 102/ this body of treaties assumes that trial in a national court is the norm, and seeks to facilitate such trial, for example by conferring universal jurisdiction on the courts of all States.

418. But that solution is not the only possible one, and it has run into difficulties in certain special cases. Hence the debate on the need for an international criminal court of some kind, a debate which has continued for many years (cf para. 403 above). It is not necessary here to deal with the various arguments in great detail. But some discussion of them is necessary, to provide a background for the Working Group's consideration of the specific issues that need to be resolved before an international criminal court could be created, and to underpin its approach to those issues.

(a) The arguments for a court

419. The case for some international jurisdictional mechanism starts from the fact that there have been since 1945 notorious cases of crimes against humanity that have gone unpunished. It has proved extremely difficult to

---

102/ Both the Genocide Convention (art. VI) and the Apartheid Convention (art. V) envisage the possibility of an international criminal jurisdiction, but without providing for its establishment.

bring such offenders to justice, and the lack of any alternative forum at the international level has exacerbated these difficulties. One reason for the difficulty is that, in many cases, serious crimes against peace or humanity have been committed by persons who were at the time members of the Government of a State. It discredits the norms of international law if they are never enforced: for example there has never, as far as the Working Group is aware, been a prosecution for genocide contrary to the Genocide Convention since that Convention was concluded, despite the fact that there have been notorious cases of genocide during that time. Similarly, the proposition that superior orders, or the official position of a person as Head of State or member of a Government, should be no defence to an accusation of a crime under international law is discredited if those persons are never brought to justice.

420. Thus the main need that has been identified has been for an international trial jurisdiction for certain kinds of offences arising in special circumstances. Situations where an international trial system might prove useful include the following:

(1) cases where trial in an international tribunal is the only forum that the relevant parties can agree on as appropriate for trial: this may be so, for example, where the nationals of a particular State are charged with a serious offence in which the State itself is alleged to have been implicated;

(2) cases where the State having custody of the accused persons is under threat (e.g. of further acts of terrorism) if it proceeds with the trial, or where the criminal justice system of a small State is overwhelmed by the magnitude of a particular offence;

(3) cases where the alleged criminals, who were formerly members of the government of a particular State, committed the alleged offences in that capacity, and the successor government is unwilling or unable to try them for whatever reason, or would prefer an international trial because of its greater legitimacy in the circumstances.

In some of these cases, there is no effective prospect of trial in any national court. In others, there may be perceived problems with the legitimacy or fairness of trial in a given national court, or even with trial in any such court.

421. One response to these arguments is to suggest that an ad hoc court or tribunal can be established, after the event, to deal with such cases. Although the criticism of retroactivity is levelled at ad hoc courts, proponents of this solution argue that that criticism is not justified. Article 15 of the International Covenant on Civil and Political Rights states that no-one shall be held guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. It does not prohibit "retrospective" changes in procedures. Proceedings before an ad hoc international criminal court would relate to offences defined by international treaties in force at the time the offence was committed, and they are accordingly not prohibited by article 15.

422. But there are other difficulties with the idea of creating ad hoc courts. To set up an ad hoc mechanism at the international level to deal only with a single offence after the offence has been committed has certain disadvantages. It takes some time to create an international court, whereas the need for such a court may arise suddenly and unexpectedly. The publicity that is likely to be involved in establishing an ad hoc tribunal after the event may appear to prejudge the outcome of the trial. Above all, disagreement on the important legal and procedural issues which need to be resolved may prevent a court from being created at all.

423. Another solution which is sometimes suggested is that an international criminal court should be a court of review only, rather than a trial court. In other words, its function would be to review decisions of national courts dealing with crimes of an international character. As noted in paragraph 397, such a system of review was suggested by the Commission in 1990 as one of three possible models. But in subsequent debate many members opposed this idea. They stressed the difficulties of creating an effective system of review of national court decisions by an international court, and the duplication of the function of national appeal courts that would be involved. The Special Rapporteur on the draft Code of Crimes in his tenth report proposed a draft article specifically excluding a court from acting as a court

of review from decisions of national courts. 103/ That view was supported by many members of the Commission (although it was doubted whether such a provision was necessary, since an international review jurisdiction would not exist unless specifically created).

424. In the view of the Working Group, the case for an international criminal court is essentially a case for a trial court, rather than an appellate or review body. Controversies surrounding allegations of serious international crimes are likely to be controversies about the facts - especially if the offences in question have already been carefully defined by international treaties in force. In criminal cases, facts are essentially found at trial rather than on appeal or review - especially if such appeal or review is to occur after existing national procedures have been exhausted - i.e. at third or fourth remove from the trial itself.

(b) The arguments against a court

425. On the other hand, some members of the Commission expressed serious reservations about the possibility of any form of international criminal court. Those reservations were shared, to a greater or lesser degree, by certain members of the Working Group.

426. One important motive for this view is simply scepticism. According to this view, international agreement on a court, other than on a purely ad hoc basis, is most unlikely. And the factors which militate against such agreement are the very factors which underlie the comparative failure of the system of universal jurisdiction over crimes such as genocide. States are unwilling to take the responsibility of prosecution of offences under a principle of universal jurisdiction, except in very special cases. In the exceptional cases where they do wish to assert jurisdiction, this is because their interests (or those of their nationals) are involved, and it is precisely in those cases that they will be unwilling to accept the jurisdiction of an international tribunal instead of their own.

103/ Document A/CN.4/442 paras. 47 and 56.

427. These members point to the meagre record of international trials in support of their position. Such trials have only occurred in the quite exceptional circumstance of the unconditional defeat of an enemy State whose officials had committed crimes, including crimes against humanity, on an appalling scale. That situation is most unlikely to recur: but if it does recur, it can be dealt with through an ad hoc tribunal. In all other cases, States will not agree to the trial of officials, or former officials, in circumstances which may reflect badly on the State or even engage its international responsibility. The most that can usefully be done in advance would be to produce some form of draft treaty, or draft guidelines, which could be used in that (unlikely) eventuality. To go further than that would distract attention from more important tasks, including the prevention or settlement of the disputes which may bring in their wake serious crimes against humanity.

428. Another argument against an international court is based on the sheer number of technical difficulties involved. Such problems arise at every stage of the process, from the apprehension and handing over of suspects to the implementation of sentences. Particular problems, taken individually, may be soluble; taken together they may present a substantial barrier to the creation of a court, and involve the risk that, even if such a court is constituted, it will not function as intended.

(c) Alternative possibilities

429. So far the focus has been on the possibility of an international criminal jurisdiction in the form of a trial court. But another possibility was raised by one member of the Working Group. According to this view, it is unrealistic to seek to create at the international level a duplicate form of trial court, with all the difficulties this entails. Instead there is a need to strengthen national courts, to enable them to deal more effectively with crimes of an international character. The present system of treaties defining international crimes is defective, in that it merely confers concurrent universal jurisdiction on State courts without doing anything more to assist them in handling what will, often, be highly charged accusations, difficult to establish and with serious implications for the international relations of the forum State.

430. Thus it was suggested that the focus should be on reinforcing national criminal justice systems to meet the responsibilities envisaged, but often not fulfilled, by the relevant international treaties. In addition to the general mechanisms of international judicial assistance in criminal cases, a number of other possibilities were suggested. One example was a form of preliminary ruling procedure, analogous to that under Article 177 of the European Economic Community Treaty. This would allow a body such as the International Court of Justice to give its opinion on issues of international law or treaty interpretation arising, or likely to arise, in the course of a trial in a national court for an offence of an international character.

(d) The Working Group's general approach

431. This Report will examine these alternative or additional possibilities in more detail in Section 4 (see paras. 473-487), in the course of its discussion of the possibilities of some other "international criminal trial mechanism". But there is no denying that the focus of international concern so far has been on some fully international system of criminal trial jurisdiction. In the cases envisaged, the problem is not that national courts are working improperly or are misconstruing the provisions of international treaties or the meaning of general international law. The problem is that such courts, and the system of national jurisdiction generally, seem ineffective to deal with an important class of international crime, especially State-sponsored crime or crime which represents a fundamental challenge to the integrity of State structures. Reinforcing national criminal justice systems is not likely to address this need.

432. So far as the more general sceptical argument is concerned (see paras. 425-427), the majority of the Working Group does not deny that there are grounds for scepticism, or that the operation of an international criminal court is likely to be an exceptional rather than a regular occurrence. But the task of constructing an international order, an order in which the values which underlie the relevant rules of international law are respected and are made effective, must begin somewhere. Although the resolution of these problems cannot rely solely, or even mainly, on a system of individual criminal responsibility, that is a necessary part of an overall solution.

Unless responsibility can be sheeted home to the individuals who decide to commit heinous crimes of an international character, the suppression of those crimes will be that much more difficult. As to the technical problems referred to in paragraph 428, while it cannot be denied that such problems exist, the analysis in this Report suggests that they can be resolved, and the view of most members of the Working Group is that it is worthwhile trying to do so.

433. There is thus a case for some form of international criminal process, going beyond what exists at present. But while affirming that this is so, the Working Group also believes that any attempt to establish a workable international trial system must start from a modest and realistic base. Criminal justice systems at national level are expensive and complex, and it would be difficult and very expensive to replicate such systems at the international level. This is particularly so since the assertion of international criminal jurisdiction has so far been extremely rare. There is no body of international experience of the exercise of criminal jurisdiction to call on, such as was available in the field of international arbitration when the Permanent Court of International Justice and its successor, the International Court of Justice, were created. In these circumstances it is better to seek to establish a flexible facility, available in case of need at the international level. It should not involve creating an expensive apparatus which may, in the event, be little used.

434. For these reasons, the Working Group was in general agreement that a court would be essentially a facility for States parties to its Statute (and possibly, on defined terms, for other States). Certain conclusions follow from this basic approach. Thus a court should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the Statute is obliged to accept *ipso facto* and without further agreement. Nor would it have exclusive jurisdiction, in the sense of a jurisdiction which excludes the concurrent jurisdiction of States in criminal cases. 104/

104/ This leaves open the question whether in the case of certain very special offences (e.g. aggression) trial in an international criminal court should be the only option: see para. 466 below.

It should not be a full-time body, but rather an established structure which could be called into operation when required. It would thus have the advantage of existing as a legal entity, able to function if and as soon as needed, without having the disadvantage of being a costly body with a permanent staff which might not be called on to act from one year to the next.

435. The discussion in the following Sections of the Report proceeds on this basis. Under this approach, the facility which the court is to provide is at the lower end of the scale of possibilities or of proposals that have been made. This is not because more extensive proposals lacked attraction, at least for some members of the Working Group. It was because most members of the Working Group were convinced that the effective choice is between a court which is a flexible and supplementary facility for States, and no court at all. More extensive proposals may be made at a later stage, when and if a modest and flexible entity has been established and has proved its worth in practice.

3. Structural and jurisdictional issues

436. This Section of the Report deals with the basic structural and jurisdictional issues that need to be resolved if an international criminal court is to be established. The main issues identified by the Working Group are as follows:

(a) The method of creation of a court;

(b) The composition of a court;

(c) The ways by which a State might accept the jurisdiction of a court;

(d) The subject-matter jurisdiction of a court;

(e) The personal jurisdiction of a court;

(f) The relationship between a court and the Code of Crimes;

(g) Possible arrangements for the administration of a court (and in particular its relationship to the United Nations system).

These will be dealt with in turn.

(a) The method of creation of a court

437. Other methods of the establishment of an international criminal court have sometimes been proposed (e.g. through a resolution of the General Assembly or the Security Council). But the normal method for the

creation of an international institution is by a treaty agreed to by States parties. Where that institution is to be part of the United Nations system, additional steps may have to be taken, but initially the necessary structure needs to be agreed on by States. This should apply here: an international criminal court should have its own Statute in treaty form. No other method would have the assurance of a sufficient degree of international support to work effectively.

(b) The composition of a court

438. The Working Group believes that a court should not be a full-time body, but an established structure which can be called into operation when required. Thus the court would be constituted according to a procedure determined by its Statute, on each occasion that it was required to act. This would substantially reduce the costs, and also help to ensure that suitably qualified persons were available to act as judges.

439. Some members of the Working Group stressed that an international court, to be fully effective in the long term, should be composed of full-time judges. This enables the growth of a committed and knowledgeable group, with a collective understanding of the aims and working methods of the court. It is also the best way of achieving genuine independence. Indeed, that view is shared by the Working Group as a whole. But all members of the Working Group acknowledge that the costs which would be involved would not, especially in the first phase of operation of a court, justify the appointment of full-time judges. It is necessary to ensure in other ways that the judges of a court possess the necessary qualities.

440. In the Working Group's view, there are two main requirements for judges of an international criminal court. The first requirement is independence and impartiality. The second is the possession of appropriate qualifications and experience; specifically, experience in the administration of criminal justice, and knowledge of international criminal law (i.e. knowledge of the provisions of international law relating to criminal jurisdiction, and of the various treaties defining crimes of an international character). In any selection process it needs to be borne in mind that, while substantive legal issues will arise, at trial level they will not do so by any means as often as

factual and procedural issues. Any system for the selection of judges to conduct a trial should be such as to ensure both their impartiality and their competence in this sense.

441. The precise details of such a system do not have to be worked out here. The selection system could be based simply on nomination by a State party to the Statute, or could require an election among nominees, presumably an election by the States parties to the Statute, or one held under the auspices of the General Assembly. The Working Group simply suggests the following as one possible and workable arrangement. It does so in order to demonstrate that the various problems can be overcome without having to create, in the initial stages of the establishment of a court, an expensive full-time judiciary:

442. Suggestion: Each State party to the Statute would nominate, for a prescribed term, one qualified person to act as a judge of the court. Persons would be qualified if they held, or had held, judicial office on the highest criminal trial court of a State party, or were otherwise experienced in penal law (including, where possible, international penal law). States parties would undertake to make judges reasonably available to serve on the court. The States parties would elect by secret ballot, from among the judges so nominated, a person to act as president of the court for a prescribed term, and four other judges who with the president would constitute a "bureau" for the court. When a court was required to be constituted, the bureau would choose five judges to constitute the court, and in doing so would take into account prescribed criteria (nationality of the accused, etc). Under the Statute judges of the court would, of course, act independently of any direction or control of their State of origin.

443. One suggestion that was made involved a slight qualification to this basic idea, without departing from the proposition that a court of full-time judges is impractical and unnecessary at this stage. According to this idea the President of the court alone would act in a full-time capacity, since it would fall to the President to oversee such administrative tasks as had to be performed, to head the bureau and generally to represent the court. Associated with this idea is the possibility that the bureau could play a role

in drawing up, with the agreement of the other judges, procedural rules of court, and possibly also its rules of evidence, in the way that the judges of the International Court of Justice make and modify the Rules of their Court.

(c) The ways by which a State might accept the jurisdiction of a court

444. As noted above, the Working Group believes that any court should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the Statute is obliged to accept *ipso facto* and without further agreement. By becoming a party to the Statute a State would accept certain administrative obligations (e.g. to contribute to the budget of the court, to nominate a judge to the court and to make that judge available when required, and to hold an accused person in its custody and over whom the court is to exercise jurisdiction at the disposal of the court for trial). But becoming a party to the Statute would not itself involve the acceptance of the jurisdiction of the court over particular offences or classes of offence. That should be done by a separate juridical act, analogous to acceptance of the Optional Clause of the Statute of the International Court of Justice, or by a process of ad hoc acceptance or unilateral declaration.

445. Again the details of such a system do not have to be worked out here. The Working Group simply suggests the following as one possible arrangement:

446. Suggestion: Each State party to the Statute would be free to accept the court's jurisdiction. This could be done either ad hoc in relation to a particular offence alleged to have been committed by specified persons, or in advance for a specified category of offences against one or more of the treaties which fall within the subject-matter jurisdiction of the court, to the extent that the treaty is in force for the State concerned. This acceptance would of course relate only to persons within the jurisdiction of the State concerned, and the effect of acceptance would depend on the rules about the competence of the court, outlined in the next two Sections of this Report. The acceptance could be unlimited in time, or could relate only to alleged offences committed after the declaration is made.

447. The Working Group notes that this idea agrees more closely with the proposal of the Special Rapporteur on the draft Code of Crimes in his

ninth report 105/ than the more extensive proposals for exclusive jurisdiction contained in his tenth report. 106/ In the debate during the present session on this aspect of the tenth report, the predominant opinion among members of the Commission who spoke on this issue was opposed to an extensive system of exclusive jurisdiction (although some members did support such a system). The Working Group envisages that the jurisdiction of the court would be predominantly or entirely concurrent with national courts, and that acceptance of the court's jurisdiction would not be a necessary aspect of participation in the Statute.

448. Another issue requiring consideration is whether States not parties to the Statute should be able to accept the court's jurisdiction on an ad hoc basis, and if so, on what terms. Since the basic purpose of a court is to assist States in finding solutions to problems involving serious offences of an international character (see para. 434 above), the Working Group believes that the court should be widely available. It should thus be available to States not parties to the Statute on an ad hoc basis, provided that they accept for the purposes of the case in hand the obligations of the Statute, and meet all (or a defined proportion) of the costs so incurred.

(d) The subject-matter jurisdiction (jurisdiction ratione materiae) of a court

449. In the Working Group's view, the court's jurisdiction should extend to specified existing international treaties creating crimes of an international character. This should include the draft Code of Crimes against the Peace and Security of Mankind (subject to its adoption and entry into force), but it should not be limited to the Code. It is not necessary to reach agreement at this stage on the precise list of international criminal law treaties: they would certainly include serious war crimes, the Genocide Convention, the Apartheid Convention, the various conventions on hostage-taking, hijacking of ships and aircraft, etc.

105/ Document A/CN.4/435/Add.1 paras. 40-59.

106/ Document A/CN.4/442 paras. 47-56.

450. In the case of some conventions defining offences which are frequently committed and which have a very broad range, it may be necessary to further limit the range of offences which are within the court's subject-matter jurisdiction. Otherwise there may be a risk of the court being overwhelmed with cases of a less aggravated character, whereas it is intended that it should only exercise jurisdiction over the most serious offences, i.e. over offences which themselves have an international character. For example the conventions dealing with illicit trafficking in narcotic drugs have a very broad range, extending to trafficking of certain quantities of drugs by persons at the very end of the chain of distribution, and whose own activities are entirely local. This problem is dealt with in the relevant provision of the draft Code of Crimes (draft article 25) by limiting it to persons who engage in "large scale" trafficking, with emphasis on those who organize and finance the drug trade: see paragraph 4 of the Commission's commentary on draft article 25. 107/

451. Another issue to be considered is whether the subject-matter competence of a court should extend to crimes against general international law which have not or not yet been incorporated in or defined by treaties in force. It may be that States would be reluctant to accept such a jurisdiction in advance, since that there is no closed list of crimes which are, or may be, crimes under general international law. On balance the Working Group believes that, at the first stage of the establishment of a court, its jurisdiction should be limited to crimes defined by treaties in force. A strong factor supporting this conclusion is that the only significant cases of international crimes not so defined (especially aggression) are actually included in the draft Code of Crimes. There is no doubt that the Code will be included in the list of treaties subject to the court's jurisdiction, subject to its conclusion and entry into force. In the Working Group's view this is the most certain and satisfactory way of bringing this range of crimes within the jurisdiction of a court.

107/ Document A/45/10, p. 69.

(e) The personal jurisdiction (jurisdiction ratione personae) of a court

452. This is one of the most difficult technical issues to be faced, in part because the potential range of circumstances is so wide, in part because of the different bases for the assertion of personal jurisdiction in criminal matters under the different national legal systems. For example, some national legal systems emphasize territoriality as a basis for criminal jurisdiction, and correspondingly have few inhibitions about the extradition of their own nationals to a State where the offence was committed. Others, while relying also on territoriality, assert criminal jurisdiction over acts of their nationals wherever committed, and will not extradite them. The Special Rapporteur on the draft Code of Crimes submitted several different proposals on this issue in his ninth and tenth reports, and in each case widely differing views were expressed by members of the Commission. 108/

453. Before discussing this issue, it is necessary to distinguish it from the question of the right of a State (whatever its relationship may be to the alleged offence) to seek extradition of a suspect under existing treaties containing an "extradite or try" clause. In other words, the issue arises of how to resolve potential conflict between the personal jurisdiction of an international criminal court and that of a State requesting extradition. That State may or may not be a party to the Statute of the court, and may or may not have accepted its jurisdiction in relation to the offence in question. This issue can, however, only arise if the international criminal court actually has jurisdiction over the offence. It raises the question of how competing claims to exercise jurisdiction are to be resolved, and is discussed in Section 5 below (see paras. 555-557). The issue presently under discussion is the prior issue, viz., what are the necessary prerequisites for an international court to have personal jurisdiction in the first place.

454. The most straight-forward case is that of an alleged offence committed on the territory of a State party to the Statute (State A) by a person who was at the time a national of that State. Since very many crimes against humanity

---

108/ Document A/CN.4/435/Add.1 paras. 40-53; A/CN.4/442 paras. 47 and 52-55 (optional jurisdiction requires consent of territorial State and of victim State(s)).

are committed within a single State, this may even be the most common case. In such a case, the court should have personal jurisdiction over the alleged offender, provided that the State concerned has accepted the jurisdiction of the court with respect to the particular offence. The Working Group does not think that the consent of any other State should be required. In particular, the Working Group does not think that in this case the special consent of a State whose nationals were victims of the offence should be required.

455. Another case which may create no difficulty is that of an alleged offence committed wholly in State A by a person, whether or not a national of State A, who was at all relevant times (including when the trial process commences) present on the territory of State A, and who is accordingly available to stand trial. The issue this example raises is whether, notwithstanding State A's undoubted jurisdiction over the offence and its lawful custody of the accused, the consent of the State of nationality should none the less still be required for trial in an international criminal court. The Working Group does not think that it should be, since it is difficult to contest the primary jurisdictional claim of State A: moreover, in this case many States do not claim jurisdiction on the basis of nationality. However, the matter requires more detailed consideration.

456. It will also require further detailed consideration to establish precisely the range of situations, going beyond the cases dealt with in paragraphs 454 and 455, which should be within the court's personal jurisdiction. The broadest possibility would be to build on the existing principle of universal jurisdiction under the various treaties. Thus it could be provided that the court has personal jurisdiction in any case where a State party to the Statute has lawful custody of an alleged offender, the State has jurisdiction to try the offender under the relevant treaty or under general international law, and it consents to the court exercising jurisdiction instead. This can be described as a system of "ceded jurisdiction". It relies on the argument that other States cannot complain if a State which is entitled under international law to exercise jurisdiction over a person for an offence should cede that jurisdiction to an international criminal court established by a multilateral treaty - at least, if all other concerned States are parties to the treaty. On the other hand, under a treaty establishing

universal jurisdiction over a crime of an international character, it can be said that all States are "concerned" and have rights, or potential rights, of jurisdiction which cannot be affected without their consent. Unless the treaty establishing the court had quasi-universal acceptance, therefore, the "ceded jurisdiction" argument would not seem to work.

457. In the Working Group's view, it is undesirable to seek to rely on broader arguments of this kind to support the jurisdiction of a court. Especially in the first phase of its operations, the essential need is to establish and reinforce the confidence of States in the court as a possible means of dealing with certain special cases. This need can only be met if careful attention is paid to the legitimate jurisdictional claims of States.

458. The Working Group does not think it necessary to set out in detail a regime of personal jurisdiction. Various options could be considered. For example, there could be a requirement that (in cases going beyond those envisaged in paragraphs 454 and 455) both the territorial State and the State of nationality should consent. Alternatively, it could be provided that the State of nationality can only prevent the court from exercising jurisdiction if that State is prepared to prosecute the accused before its own courts (the converse of the "aut dedere aut judicare" principle). For present purposes it is enough to say that the Working Group believes a solution can be found which respects the existing jurisdictional systems of States in criminal matters, and which none the less caters for most of the situations which are likely to arise (in particular, the situations dealt with in paras. 454 and 455 above).

459. To summarize the last three subsections of this Report, the Working Group envisages a system under which three conditions would have to be met for an international criminal court to have jurisdiction over a case:

(1) the case must involve an alleged crime falling within its subject-matter jurisdiction;

(2) the State or States which, under the provisions dealing with personal jurisdiction, are required to accept the court's jurisdiction must have done so, either in advance or ad hoc;

(3) the alleged crime must fall within the terms of their acceptance of the jurisdiction (e.g. as to subject-matter, time, etc).

(f) The relationship between a court and the Code of Crimes

460. On the instructions of the General Assembly, the work of the Commission on the possibility of an international criminal court has been done within the framework of the draft Code of Crimes. There are clearly important links between the two projects. An international criminal court, duly established, would ensure the most objective and uniform interpretation of the Code. It would be unfortunate if some States did not ratify the Code because of the lack of appropriate means of implementation. Similarly, it would be unfortunate if States did not adhere to the Statute of a court, because of a perceived lack of objective jurisdiction in the absence of the Code.

461. On the other hand, the converse possibility also exists: that States which have reservations about the Code might none the less be prepared to accept the Statute of a court as a jurisdictional facility, one which would usefully supplement the existing range of international treaties defining offences of an international character. If the court is useful in relation, for example, to the crime of genocide as defined in the Code, it must be equally useful in relation to that crime as defined in the Genocide Convention itself, which the Code provision simply repeats. The essential point, if a court is to become a reality, is to maximize the level of support it can receive from States.

462. Thus the possibility should also be left open, when drafting the Statute of a court, that a State could become a party to the Statute without thereby becoming a party to the Code, or that a State may confer jurisdiction on the court with respect to the Code, or with respect to one or more crimes of an international character defined in other conventions, or on an ad hoc basis. The criterion should be that of maximum flexibility as regards the jurisdiction *ratione materiae* of a court, and this is most readily achieved if the Code and the Statute of a court are separate instruments.

463. For these reasons, the Working Group concludes that the Statute of a court and the draft Code of Crimes may constitute separate instruments, with the Statute of the court providing that its subject-matter jurisdiction extends to the Code in addition to other instruments. In other words, a State should be able to become a party to the Statute without thereby becoming a

party to the Code, although the Code, once it has been finally adopted, would be one of the international instruments defining offences of an international character which would be subject to the competence of the court.

464. This substantive conclusion is without prejudice to the question of the treatment of the subject within the Commission, bearing in mind the connection of this issue in the General Assembly to the draft Code of Crimes and to the proposal of Trinidad and Tobago (see para. 404 above).

465. Of course, to exercise such jurisdiction it will be necessary for the Statute to give proper guidance on the law to be applied, on applicable penalties etc., so as to ensure that any gaps which may exist in the various treaties are filled. The principle nullum crimen sine lege requires no less. Subject to this essential qualification, the Working Group concludes that it could be useful to establish a court with jurisdiction over offences defined in the various treaties referred to in paragraph 449, as well as with jurisdiction over the Code.

466. It should be stressed that there is a separate issue, whether the Code itself should depend on the creation of an international criminal jurisdiction, at least for certain offences (e.g. aggression). Some members of the Commission believe that the draft Code of Crimes can only be satisfactorily implemented if there also exists an international criminal court with jurisdiction over some of the offences defined in the Code. Others believe that this linkage is desirable. But this does not mean that the proposed court should be limited to offences contained in the Code. A court could have an independent utility, especially if it was widely supported by States. This suggests that it should be established under its own Statute.

(g) Possible arrangements for the administration of a court

467. Only the briefest outline of administrative issues needs to be given here. One important issue (which the 1953 Committee left open) is whether a court should be part of the United Nations system, or should operate as an independent entity. The Working Group notes below (see para. 487) that some of the expressed needs for an international criminal court could perhaps be met by some form of regional criminal court, which could function independently, or in conjunction with the relevant regional organization. But

in so far as any court is worldwide in its scope and jurisdiction, in the Working Group's view it clearly should be associated with the United Nations.

468. In the first phase, at least, it is not necessary to seek to do this by formally incorporating the court within the United Nations structure. It has already been concluded that a court should be established under its own constituent treaty. But this does not prevent the court from being brought into relationship with the United Nations, either through a relationship agreement pursuant to Articles 57 and 63 of the Charter or otherwise. A possible model in this respect is the Human Rights Committee established under the International Covenant on Civil and Political Rights, or the Committee on the Elimination of Racial Discrimination, established under the International Convention on the Elimination of All Forms of Racial Discrimination. Depending on what choice is made, it will of course be necessary to comply with United Nations administrative and budgetary procedures, and no doubt to obtain the approval of the General Assembly.

469. On other administrative matters, the Working Group has already stressed that the court should not have a permanent judicial staff. It should, by the same token, have few or no permanent administrative staff, although this depends to a degree on the details of the prosecution system to be established. It may be possible for registry services to be performed by arrangement with the Registry of the International Court of Justice, or possibly by the United Nations Legal Counsel's Office, except in cases where the court is called into action. Those registry functions are not likely to be extensive.

470. Wherever the administrative functions associated with the court are carried out, the Working Group believes that where possible the court should sit in the State where the alleged offence was committed, or at least within the same region, while it is actually hearing a case. But this may not always be possible, especially where there are perceived security problems: the issue is not one that can be determined in advance by any rule as to venue.

471. In cases where the court does not sit in the locality of the alleged crime, arrangements would need to be made for it to sit at an appropriate place, perhaps at the seat of the International Court at The Hague.

472. Since the Working Group envisages a modest structure rather than a standing institution with a substantial staff, the ordinary costs of the suggested court should be modest, and could be borne by the parties to the Statute, or, possibly, by the normal United Nations budget. On the other hand any actual trial, depending on its length and complexity, could be an expensive matter - as criminal trials increasingly are at national level. Detailed arrangements for meeting these additional costs do not need to be discussed here, but the Working Group envisages that these additional costs would be substantially borne by the States making use of the court, according to some agreed formula.

4. An international criminal trial mechanism other than a court

473. General Assembly resolution 46/54 requested the Commission to examine, *inter alia*, "proposals for the establishment of an international criminal court *or other international criminal trial mechanism*" (see para. 402 above, emphasis added). This language reflects the fact that, in searching for answers to the problems facing their criminal justice systems, some States have wondered whether a mechanism other than an international criminal court might be possible. Moreover, other language versions of the resolution are not so explicit in referring to an international "trial": the French language version, for example, refers to "un autre mechanisme juridictionnel de caractère internationale", and does not use the word "procès" ("trial"). It thus seems to envisage some form of international jurisdictional structure in aid of a criminal trial, which might be a trial before a national court.

474. Before discussing the various possibilities, one basic point needs to be made. The Working Group's concern is with serious criminal charges levelled at accused persons. In respect of such proceedings, essential minimum standards of due process are laid down both by the International Covenant on Civil and Political Rights (see especially arts. 14 and 15), and by the various regional human rights conventions. 109/ It is possible to envisage national structures underpinning a criminal process at the international level

---

109/ See African Charter of Human and People's Rights, art. 7; European Convention on Human Rights, arts. 5-7; American Convention on Human Rights, art. 8.

(such as in the proposed court), or conversely international provisions which are ancillary to and which reinforce a national process. Either way there must be at the centre of the process a trial of the accused which meets internationally accepted standards. No doubt the procedural and other incidents of a trial process can vary considerably. Articles 14 and 15 were not intended to reflect any particular national system of criminal procedure. But the basic point remains: whether at the national or the international level, in relation to serious offences of an international character defined in the various treaties and in the draft Code of Crimes, the only appropriate "criminal trial mechanism" ("mechanisme juridictionnel") is a criminal court, duly constituted - i.e. a body with appropriate guarantees of independence exercising judicial functions.

475. On this point there is no disagreement within the Working Group. But thereafter, different lines of emphasis emerged in seeking some "other international criminal trial mechanism" that might assist in resolving the various problems.

476. One line of argument suggested that these additional words had in view the creation of a very flexible mechanism, albeit at the international level - a simple mechanism, essentially voluntary in character, on which affected States could call in case of need. According to this view, what was envisaged, at the level of criminal process, was something more like the Permanent Court of Arbitration than the Permanent Court of International Justice or its successor, the International Court of Justice.

477. It will be apparent from the earlier paragraphs of this Report, and especially from Section 2, that the Working Group accepts much of the thinking which underlies this approach. The suggested outline for an international criminal court, which is set out in this Report, is as flexible, as facultative, as voluntary as an international court could be. On the other hand there must be some limit to flexibility. To be a facility to States, the court has to exist - and this means, in the Working Group's view, that it needs to be constituted as a legal mechanism in advance of the occasion for its possible use (see paras. 422 and 433-435 above). Beyond that minimum point, the proposals discussed here do provide for substantial flexibility.

No doubt different conclusions may be reached on some of the particular issues discussed in this Report: that is a matter for subsequent discussion, in the event that proposals for an international criminal jurisdiction are to be taken further. But the Working Group regards its approach as reflecting, and as far as possible integrating, both strands of the General Assembly's mandate to it to study "an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism", if one assumes that the jurisdiction in question is to provide for trial of accused persons at the international level.

478. The second line of emphasis, however (see para. 475 above), precisely called in question this assumption - that what was needed was an international trial mechanism, as distinct from an international mechanism in aid of national trial systems in cases with an international element. This approach has already been outlined (see paras. 429 and 430 above), and some general comments on it have been made (see para. 431 above). Without repeating or detracting from what was said there, the Working Group believes it is important to canvass some of the jurisdictional mechanisms which could be adopted to reinforce the exercise of national criminal jurisdiction. Such mechanisms might reduce the need for an international criminal trial mechanism, as envisaged elsewhere in this Report. Or they might be supplementary or alternative. In any event, they merit some discussion here.

479. One possibility would be a mechanism which helped to ensure that a national court, in dealing with a crime of an international character, duly applied the relevant provisions of international law. An example of such a mechanism is the reference procedure established under article 177 of the European Economic Community Treaty. Under article 177, a national court can (and in certain cases must) seek a decision of the European Court of Justice on a matter of European law arising in a case before it. The reference procedure applies both to civil and criminal cases, and to trial courts as well as appeal courts (though references from a trial court are rare). Without an amendment to the Statute of the International Court of Justice a similar reference procedure would have to occur via the Court's advisory jurisdiction (perhaps channelled through a sub-committee of the

General Assembly). Such a procedure would necessarily be optional, and the Court's opinion would not be formally binding. None the less it could be a way of helping to ensure conformity with international law in particular cases, including cases involving crimes of an international character.

480. Another suggestion, more closely focused on such crimes, would be some form of preliminary international procedure whereby certain State conduct could be qualified as fitting a given international category (e.g. aggression, intervention), after which the trial of individuals for their involvement in the activity could take place at national level. In such a case the international procedure could be a necessary prerequisite to trial, or it could be optional.

481. The last suggestion, in particular, responds to a real difficulty that has to be confronted in relation to the draft Code of Crimes, and which has led many members of the Commission to believe that the satisfactory implementation of the Code will require some form of international criminal jurisdiction (see para. 466 above). The problem is that a national court does not seem an appropriate forum for the trial of persons charged with crimes, when the criminality of the individual conduct is essentially dependent on the question whether a foreign State has acted unlawfully. It may be very difficult for a national court, which may be a court of a party to the conflict in question, to determine in an impartial manner whether particular conduct constituted, for example, "aggression". The State against which that charge is made would not itself be a State party to the proceedings, so that the trial of an individual accused could become a surrogate for a broader range of issues arising at the international level. Such circumstances are not conducive to the due administration of the criminal law.

482. In relation to the crime of "aggression" as contained in the draft Code of Crimes, there is also the problem that the primary responsibility for disputes involving international peace and security is vested in the Security Council, a non-judicial body, under Chapter VII of the Charter.

483. Other suggestions include a system of international inquiry or fact-finding, in some way linked to the trial of persons involved in a

national court. Various international fact-finding bodies exist, 110/ or have been proposed. 111/ But these have so far not been envisaged as operating in conjunction with national trial courts. Another suggestion is an official system of observing national trials, an activity so far carried on by various international non-governmental organizations.

484. There are difficulties both in official international inquiries which parallel a national trial, and in the idea of a trial-observer acting in an official international capacity. In particular, the level of international involvement may not be enough to provide full guarantees that the proceedings would be fairly conducted, but would tend to legitimize the proceedings anyway. Moreover a trial is not like an election or an act of self-determination (in both of which official inquiries or observers have played a useful role). Once a person has been tried and a final verdict reached, no further criminal trial procedure is available. In the present context, it is hard to see how a "hybrid" system, whether involving observers or a commission of inquiry at the international level, could overcome this problem.

485. However valuable the suggestions discussed in paragraphs 479-483 above, a majority of the Working Group believes that these suggestions do not address the major concerns which underlie calls for an international criminal jurisdiction. As noted already (para. 431 above), those concerns relate not to the inaccurate application of international law or treaty provisions in criminal trials otherwise duly conducted. They relate to egregious cases of international crimes which go unpunished for lack of an available forum, or to proposed trials in forums which could be thought to be partisan in relation to the issues at stake. In short, they relate to cases where the very existence or non-existence of a trial is the problem. The ideas outlined in paragraphs 479-483 do not address this difficulty.

110/ E.g. the International Fact-finding Commission established under article 90 of Additional Protocol 1 of 1977 to the Geneva Conventions of 12 August 1949 (1977).

111/ E.g. the International Law Association's proposal for an International Commission of Inquiry: see Report of the 63rd ILA Conference, Warsaw (1988).

486. There are, no doubt, more flexible forms of international judicial assistance which might help some countries, especially smaller countries with limited legal and judicial resources. These might include the secondment of experienced judges from related neighbouring legal systems; cooperative regional courts of appeal (such as the arrangements for appeals in some of the smaller Pacific Islands); assistance with judicial education and training, etc. But none of these ideas have any special relevance to the problem addressed in this Report.

487. One idea that may have real potential relates to the concern expressed about the trial of major drug-traffickers in smaller countries. Where this problem is special to a particular region, it may be that a regional trial court, established in cooperation by the countries concerned, would be one way of resolving it. Whether such a court should be part of the United Nations system, or whether technical and other assistance by relevant United Nations programmes or other relevant international organizations, should be further explored.

5. Applicable law, penalties and due process

488. The Working Group next considers the issues of applicable law, penalties and due process in proceedings before an international criminal court.

(a) The applicable law

489. In drawing up provisions dealing with the law to be applied by an international criminal court, account must be taken of the specific nature of the proceedings before that body, which is, of course, judicial in character. The trial of an individual charged with committing a crime coming within the jurisdiction of such a court is not an international dispute between two subjects of international law. Rather, an international mechanism would be employed to bring to account persons accused of a serious crime of an international character falling within the jurisdiction of the court. A court would not be created to deal with minor matters, or matters falling exclusively within the domestic jurisdiction of any State. Any clause dealing with applicable law will have to be drafted to take into account this essential feature.

490. As noted above (para. 410), the tenth report of the Special Rapporteur on the draft Code of Crimes discussed *inter alia* the question of the law to be

applied by an international criminal jurisdiction (paras. 422-447) and put forward alternative draft proposals on this issue, for the purpose of stimulating debate. These provisions attracted a rather diverse reaction from members of the Commission: the comments made have been taken into account in what follows.

491. In order to have a clear idea about the scope and wording of a provision on the applicable law, it is necessary to examine separately the issues relating to (i) the definition of the crimes falling within the jurisdiction of a court; (ii) the general rules of criminal law (defences, etc.); and (iii) the applicable procedure. In addition, the consequences deriving from the fact that any court will be operating at the international level must be examined.

(i) The definition of crimes

492. As to the crimes which may be brought before a court, it is necessary to limit the court's jurisdiction to offences which are genuinely of an international character. This issue has already been examined (see paras. 449-451 above), and the conclusion reached that the jurisdiction of a court should be limited to offences defined in treaties in force. Those treaties would be specified in the Statute of a court.

493. The principle "nullum crimen sine lege", stated in article 15 (1) of the International Covenant on Civil and Political Rights, provides strong support for this approach. The principle that the act of which a person is accused should have been punishable at the time it was committed has to be understood quite literally. The alleged wrong-doer must have been obligated to observe the rule in question. It is not sufficient that the rule existed in an inter-State relationship in the classical sense of international law which, in principle, creates rights and obligations for subjects of international law only. Rather, the accused person must have been an addressee of the rule concerned. In the context of the proposed Statute, this can be achieved by limiting the jurisdiction of the court to specified crimes of an international character defined by treaties in force. It will be a matter for each State party to ensure that its internal law gives effect to those treaties, whether because of the status of treaties in the constitutional system of the State, or as a result of implementing legislation.

494. This is not to deny that there exist rules of general international law (e.g. the prohibition of genocide) which directly bind the individual and make individual violations punishable. Thus it would also have been possible to include in the subject-matter jurisdiction of a court provision for the trial of offences against general international law which are not defined in any treaty. That possibility has already been rejected, for the reasons given in paragraph 451 above. In its work on the draft Code of Crimes, the Commission is seeking to codify the gravest crimes against general international law, those which jeopardize the very foundations of the community of nations. Thus, provided that the Code (once it has been concluded and has entered into force) is included in the list of treaties coming within the jurisdiction of a court, it is not necessary to rely on the category of crimes under international law as a separate basis of jurisdiction.

(ii) The general rules of criminal law

495. As far as the general part of a system of criminal law is concerned, rather different considerations apply. Most treaties which set forth international crimes are silent about defences and extenuating circumstances. While various crimes under customary international law exist, no additional rules of international law on such matters as defences can be said to have evolved. 112/ Even the draft Code of Crimes (art. 15) confines itself to referring to the "general principles of law". Similarly the United Nations War Crimes Commission Draft referred to the principles of criminal law recognized by the Members of the United Nations (see art. 18).

496. Alternatively, or additionally, reference could be made to the applicable national law. Normally, an individual is subject only to national law. In such instances, the relevant provisions of national criminal law are a necessary element of an orderly prosecution. So far as crimes defined by international treaties are concerned, provisions of national law may thus be relevant. But this presents potential problems at the international level,

---

112/ Of course in dealing with issues of international law arising in the course of a trial (e.g. questions of treaty interpretation, determining the nationality of an accused person) the normal sources of international law indicated in Art. 38 of the Statute of the International Court of Justice would have to be applied.

where national law is in principle only a question of fact. As far as concerns the catalogue of applicable sources of law in the Statute of a court,there seem to be two ways of dealing with this difficulty.

497. On the one hand, it is possible to refer directly to "domestic law", as was done in a number of earlier drafts. Thus, the 1953 United Nations Draft Statute provides in an extremely succinct formula:

> The Court shall apply international law, including international criminal law, and where appropriate, national law.

498. On the other hand, another, perhaps more elegant, model brings in national law as a supplementary condition. An international court itself would only apply rules of international law, but it would have to be satisfied that the crime was punishable under national law as well. Thus the London International Assembly Draft of 1943 provides (art. 27 (2)) that:

> No act may be tried as an offence unless it is specified as a criminal offence either by the law of his residence at the time of the commission of the act or by the law of the place where the act was carried out, provided in each case that such law is in accordance with the general principles of criminal law recognized by the United Nations.

By virtue of this clause, national law would only be resorted to indirectly.

499. In his tenth report, the Special Rapporteur on the draft Code of Crimes suggested a provision on applicable law which, inter alia, used the "where appropriate" formula, drawn from the 1953 Draft Statute, to allow a court to apply national law. 113/ In the debate that proposal drew a rather mixed response. The matter is certainly one which warrants further study, but, for the reasons given, it may be difficult in practice to resolve issues of individual criminal responsibility without at least some form of renvoi to applicable national law.

(iii) Applicable procedure

500. The Statute of a court, or rules made thereunder, should specify to the greatest extent possible the procedural rules for trials. However, it may be necessary for the court to regulate its own procedure, in cases not covered by

---

113/ Document A/CN.4/442, paras. 21 and 40.

the Statute or rules, by drawing on the principles common to the codes of procedure of the States parties. In this respect, no objection may be derived from the principle "nullum crimen sine lege", whose scope is limited to substantive law.

(iv) Conclusion

501. It is not easy to condense these various considerations into one brief formula. In particular, a general clause, paralleling Article 38 of the Statute of the International Court, would not do justice to the complexity of the issues. None of the categories of rules listed in Article 38 can be dispensed with. But it may be necessary to add references to other sources such as national law, as well as to the secondary law enacted by organs of international organizations, in particular the United Nations, in order to supplement the primary rules contained in the treaties which define the jurisdiction of the court.

(b) The penalties to be imposed

502. Similar issues arise with regard to penalties. Even the Genocide Convention confines itself to requiring States to provide "effective penalties" (art. V) for persons guilty of genocide. An international court, which did not have the benefit of a rule in its Statute setting forth the relevant penalties to be applied at the international level, would necessarily have to base the sentencing of convicted persons on the applicable national law, or perhaps on principles common to all nations. This latter formula raises serious problems, even as a recipe of last resort, since the guarantee of clarity and certainty of the law embodied in article 15 of the International Covenant on Civil and Political Rights applies also to penalties ("nulla poena sine lege"). This strongly suggests the need for a residual provision in the Statute of a court, dealing with the question of penalties. That provision could apply in any case where no penalty was specified in the applicable law, or where the specified penalty fell outside the range of penalties which the Statute allowed the court to impose. 114/

114/ The matter of penalties was considered by the Special Rapporteur on the topic, in the context of an appropriate penal provision in the draft Code of Crimes. See ninth report, document A/CN.4/435 paras. 4-36, and for the Commission's conclusions thereon see document A/46/10, paras. 67-105, and 171.

(c) Ensuring due process

503. No lengthy account is needed to clarify the issue of due process. The current standard of trial is embodied in article 14 of the International Covenant on Civil and Political Rights. Article 8 of the draft Code follows more or less textually this yardstick, and a similar provision should be included in the statute of a court.

6. Prosecution and related matters

504. Finally, in this Section of its Report, the Working Group outlines some possible solutions to the general question of how proceedings could be initiated before an international criminal court. This discussion proceeds on the basis that such a court would not try defendants *in absentia*. In this context it should be noted that article 14 (3) (d) of the International Covenant on Civil and Political Rights refers to the right of an accused person "to be tried in his presence". In the case of an international criminal court, the requirement that the defendant be in the custody of the court at the time of trial is also important because otherwise such a trial risks being completely ineffective. On this assumption, the following issues are dealt with:

(a) The system of prosecution;

(b) The initiation of a case;

(c) Bringing defendants before a court;

(d) International judicial assistance in relation to proceedings before a court;

(e) Implementation of sentences;

(f) Relationship of a court to the existing extradition system.

505. It should be noted that in the time available the Working Group has not been able to discuss these issues in much detail: what follows in this Section of the Report is accordingly tentative and exploratory. The issues will need fuller examination if it is decided that the Commission should proceed to draft a Statute for a court.

(a) The system of prosecution

506. A number of quite different proposals have been made to deal with these issues, in earlier drafts for an international criminal

court. 115/ The issues have also been discussed in the reports of the Special Rapporteur of the topic draft Code of Crimes. 116/ Essentially there are three options: (1) a complainant State as prosecutor; (2) an independent standing prosecutorial organ; and (3) an independent prosecutor appointed on an ad hoc basis. In the case of the second and third options, it might be possible to have a prosecution team appointed.

507. The first option has the virtue of helping to ensure a strong and vigorous prosecution, and it is also possible that the law and procedure of the prosecuting State could be imported into the court proceedings for the purposes of the trial. However, it may be that many smaller States which are entitled to initiate a case by complaint to the court would wish to distance themselves to some extent from the trial, and would therefore not be interested in providing the prosecutor.

508. Since the Working Group does not favour the establishment of a permanent, standing court, it may be inconsistent to establish a permanent prosecutorial organ, although conceivably there could be a permanent prosecutorial organ alongside an ad hoc court. But it is doubtful whether a permanent prosecutor would have enough work to justify that position, at least in the first phase of the establishment of a court.

509. For these reasons, an ad hoc independent prosecutorial system is recommended, whereby on the occasion of a trial a prosecutor would be appointed on a basis to be agreed. Careful consideration will have to be given as to how a prosecutor will be identified on an ad hoc basis. One option would be for the court to appoint a prosecutor, after consultations with the State making the complaint and any other State concerned. In the case of a complaint of aggression, for example, the prosecutor could be nominated by the Security Council.

(b) The initiation of a case

510. The prosecutor's functions would include the investigation, collection and production at the trial of all necessary evidence, the preparation of the formal accusation, and acting as prosecutor at the trial.

115/ A summary of earlier proposals is set out in the Appendix.

116/ See A/CN.4/435, paras. 60-64.

511. Since the prosecutor would necessarily have discretion as to whether to prosecute, it may be necessary to give States concerned the right to appeal to the court against a decision not to prosecute. This would help to assure those States that their complaints had been given thorough and impartial consideration, and (if there is to be only a single prosecutor) would comply with the principle that excessive discretion under an international judicial system should not be vested in one person.

512. Many of the earlier drafts for an international criminal court have provided for a formal preliminary investigation, at which the adequacy of the evidence against the accused would be tested. If a system of prosecution on the complaint of a State party was adopted (i.e. without an independent prosecutorial role), there would be a strong case for a preliminary investigation, perhaps before a small chamber of the court. On the other hand, if an independent prosecutor is to be nominated, the Working Group inclines to the view that there would be no need for a formal preliminary hearing. The court will have the power to dismiss frivolous or unsubstantiated charges at the trial.

513. So far as concerns the initiation of a case by complaint, it will be necessary to identify an official or body to whom such complaint is to be made in the first place. This could be the President of the court or its Registrar. The complaint would be a triggering element in relation to a possible prosecution. Plainly, in the absence of a permanent independent prosecutorial office, it could not be envisaged that cases would be brought before the court other than on a complaint from a State party (or of the Security Council in the case of a complaint of aggression). The Working Group does not believe that in the first phase of the operation of the court, it is necessary to confer an independent power to prosecute, although in the longer term such a power would be, at the very least, desirable.

514. The question is whether the power of complaint should be limited to a State whose consent is a prerequisite for the court's jurisdiction in the particular case. 117/ Certainly such States should have the right to bring a

---

117/ The identification of the States which should be required to consent is discussed at paras. 452-458 above.

complaint. But in the Working Group's view the right to bring a complaint should extend to any State party which has accepted the court's jurisdiction with respect to the offence in question (including, but not limited to, a State which is a victim). Consideration could also be given to allowing a victim State party to the court's Statute to initiate a case by complaint, even though that State has not accepted the jurisdiction of the court with respect to the offence.

515. Another category of States which could have the right to initiate complaints is a State which has custody of the suspect and which would have jurisdiction under the relevant treaty to try the accused for the offence in its own courts. Again, there is a good case for involving such a State, having regard to the Working Group's general approach to a court as a facility (see para. 434 above), and to the fact that the cooperation of that State would necessarily be required if a trial was to proceed.

516. If States other than those whose consent is required for the court to have jurisdiction are empowered to bring a complaint, some preliminary procedure will need to be instituted to ensure that the necessary consents have been or will be given before further steps are taken. This would be a registry function. Provided the jurisdictional rules are clear, that function should not involve significant difficulties, but the court could be empowered to resolve difficulties or uncertainties by some form of in camera proceeding, at which the relevant States would be represented.

517. When the complaint is lodged, it will be examined by an independent prosecutor appointed on an ad hoc basis. The prosecutor will, if appropriate, issue a formal accusation charging the alleged offender with the commission of a specific crime which falls within the subject-matter and personal jurisdiction of the court.

(c) Bringing defendants before a court

518. Since a court will not try an accused person in absentia (see para. 504 above), in the case where the accused is not in the custody of the State which initiated the complaint it will be necessary to take steps to bring that person before the court. Inevitably the nature of those steps will differ depending on whether the accused is present in a State party to the Statute which has, or which has not, accepted the jurisdiction of the court

with respect to the offence, or in a third State. The present discussion is a preliminary one, and in the elaboration of a draft Statute further attention will need to be given to each of these situations, taking into account any guidance received from the General Assembly in relation to the various issues.

519. In his tenth report, the Special Rapporteur on the draft Code of Crimes recommended that the Statute of a court should provide that transfer to the court was not to be regarded as extradition. [118] This was on the basis that, since that State is a party to the Statute, the international court is not to be equated to a foreign court, but can be treated for these purposes as if it were a court of the transferring State. This approach is appealing since it would facilitate the court's obtaining jurisdiction over the accused in the simplest and most direct manner possible. It would also avoid the need for any provisions dealing with the issue of extradition.

520. That approach had previously been adopted in the Draft Convention for the Creation of an International Criminal Court (London International Assembly, 1943), and implicitly in the 1953 Revised Statute for an International Criminal Court, prepared by the United Nations Committee on International Criminal Jurisdiction.

521. But the approach would present difficulties, at least for some countries, for two kinds of reasons. The first relates to the problem of securing the fundamental rights which are protected, for example, by standard extradition arrangements. Although an international court might not be a foreign court, at least _vis-à-vis_ the parties to its Statute, nor would it be a domestic court of a State. Thus the arrangements that might be appropriate when transferring cases or persons within a single judicial system would not necessarily be appropriate for an international court. Moreover the primary need is to gain and maintain the confidence of States in a court. To do this, it would need to be shown that the standard safeguards provided for in extradition treaties were complied with, one way or another, in relation to the court.

---

[118] Document A/CN.4/442, paras. 76-83.

522. In the case of extradition, the requested State generally needs to be able to assure itself of the following matters: (1) that a punishable offence is involved (double criminality); (2) that there are not substantial grounds for believing that the request has been made for the purpose of punishing a person on account of race, religion, nationality, political opinion, sex or social status; (3) that the principle of double jeopardy would not be violated by the extradition; (4) that the person has not become immune from prosecution for any reason (e.g. lapse of time, amnesty); (5) that the person will only be charged with the offence in respect of which the extradition is granted (speciality); and (6) if the accused has already been tried *in absentia*, that sufficient notice was given of the trial and a sufficient opportunity for the defence.

523. In the case of an international criminal court such as is envisaged, requirements (1) and (5) above will be irrelevant, because the person will be charged with a specified crime or crimes falling within the jurisdiction of the court, being crimes defined by treaties in force. Nor will requirement (6) be relevant, since the court will not be empowered to try persons *in absentia* (see para. 504 above). Provided that a satisfactory rule about double jeopardy is contained in the court's Statute, no problem is likely to be created by requirement (3). As to requirements (2) and (4), these could safely be left to be determined by the requested State: to do so would not undermine the idea of mutual support for a court on the part of the States parties to its Statute.

524. The second difficulty is that in some States it might be constitutionally difficult, or even impossible, to deem an international court to be a domestic court, or to seek to equate the two, because local constitutional requirements would simply not be met. Rather than risking additional difficulties by a deeming provision, it seems best to treat the court as for these purposes *sui generis*, i.e. neither foreign nor domestic, and to deal with the particular problems of transfer on their merits.

525. In other words, it seems that it will be necessary for the Statute of a court to include provisions laying down the minimum requirements for transfer. *Vis-à-vis* the parties to the Statute, these arrangements could be set out in an annex or an associated agreement, which would be binding

ipso facto on such States. Vis-à-vis third parties, it may have to be done by way of something equivalent to an extradition agreement, or by agreement in the particular case. The parties to the Statute could also be encouraged to make provision for transfer of accused persons to the court in their own bilateral extradition treaties.

526. The handing over arrangements to be included in an annex could be drafted in positive, negative or the more traditional "mixed" form:

(a) The positive approach would involve listing the grounds for handing over, and would exclude all or most grounds for refusal, adequate procedural safeguards having been built into the Statute itself.

(b) Alternatively, the negative approach could be limited to a broad obligation to assist in handing over accused persons, together with a list of grounds which could not be cited for denying transfer. Such a list of unacceptable grounds would include: (i) that the requested State regards the offence for which transfer is sought as a political offence; and (ii) the nationality of the requested person. This is essentially the approach contained in the United Nations Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other International Crimes (E/CN.4/1426 (1981)).

(c) Finally, it would be possible, and may be prudent, to draft standard extradition-type provisions, including a list (as in subpara. (b) above) of grounds for refusal which are specifically excluded.

527. The means by which transfer could be requested will in part depend on the nature of the prosecution arrangements. At least, such a request must be from an authority expressly designated in the Statute, must be in writing, must contain as accurate a description as possible of the person sought, and must specify the offence and the evidence, which must be prima facie sufficient to justify putting the accused on trial. The requested State would be empowered, and if necessary required, to place an accused person under provisional arrest pending completion of the process of transfer.

(d) International judicial assistance in relation to proceedings before a court

528. In the normal preparation, investigation and prosecution of a criminal case with transnational elements there is a need for mutual assistance between

States to facilitate the judicial process. Thus there exists a network of mutual assistance arrangements and treaties between many States on a bilateral, regional and multilateral level. The term "mutual assistance" or "mutual legal assistance" is preferred to "judicial assistance" since the assistance is wider than assistance in judicial matters. On the other hand, the assistance in the case of an international criminal court would be, as it were, "one-way" assistance to the court rather than reciprocal assistance, and it would always be related to proceedings, actual or proposed, before the court. The term "international judicial assistance" is accordingly used here.

529. If there is a need for a regime of mutual legal assistance as between States in the prosecution of a criminal case, that need is even stronger in the case of a new international judicial body such as is envisaged. Apart from its novelty, the court will lack many of the features present in the criminal justice systems of States, and not least the institutional machinery which facilitates mutual assistance between States.

530. The assistance the court will require of States parties to its Statute will include matters such as: (a) ascertaining the whereabouts and addresses of persons; (b) taking the testimony or statements of persons in the requesting State or elsewhere; (c) effecting the production of or preservation of judicial and other documents, records or articles of evidence; (d) service of judicial and administrative documents and (e) authentication of documents. Such assistance may also be required from States which are not parties, although obviously this will have to be dealt with on a separate (and, it may be, a case-by-case) basis.

531. There are three options in relation to international judicial assistance: (1) a general facilitating provision in the Statute; (2) a general provision supplemented by a non-exclusive list of matters with respect to which assistance could be sought; and (3) a full-scale treaty on judicial assistance, annexed to the Statute of a court.

532. The first approach is general and simply calls for a provision in the court's Statute based on an article found in most international conventions dealing with the suppression of a particular crime. For example article 11 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention) provides:

> States parties undertake to grant the Court the greatest measure of assistance in connection with criminal proceedings brought in respect of crimes within the Court's jurisdiction. The law of the State requested shall apply in all cases.

533. The virtue of this formulation is its simplicity and generality. It imposes a simple obligation to grant the court "the greatest measure of assistance" without specifying the particular types of assistance. It would therefore be open to a court to seek any type of assistance from a State party, provided it is in connection with criminal proceedings brought in respect of offences within the court's jurisdiction. The term "proceedings" is not confined to the trial itself. The better view is that (having regard to the generality of the phrase "in connection with") it would also cover investigations leading up to the trial. The Montreal Convention has been so interpreted in practice. However, if there is any doubt about this matter, the formulation could be amended to read "in connection with criminal investigations relating to and proceedings in respect of crimes within the court's jurisdiction."

534. Another advantage of the general approach is that it avoids the need specifically to list the kinds of assistance being sought, and the elaboration of a regime governing the grant of such assistance, including difficult questions such as the bases for refusing assistance.

535. The greatest drawback in the simple, general approach is that its lack of detail and its failure to deal with nuances may be exploited by a requested State which is unwilling to cooperate with the court. This could happen because, in the Montreal Convention formula, the second sentence makes the law of the requested State applicable in relation to all matters pertaining to a request. Thus such a State could deny a request for assistance on the ground that its law does not provide for the grant of the assistance sought, or that even if its law does so provide, some particular condition for the grant of the request has not been fulfilled. On the other hand, while it is true that in a treaty regime for mutual assistance the law of the requested State is dominant, there will inevitably be treaty provisions which qualify the operation of that law.

536. The second option would involve supplementing a general provision (such as art. 11 of the Montreal Convention) by listing non-exhaustively the

matters in respect of which assistance may be sought from States parties, and possibly - though no obligation could be imposed in this respect - from non-parties. The list could be drafted so as to include both specified matters and also "any other matter agreed upon by the court and a State party".

537. While this approach would ensure agreement between the court and States parties on certain identified matters in respect of which assistance may be sought, it has the same disadvantage as the first option of yielding unqualified application to the law of the requested State.

538. The third option is the most difficult to draft but may be the best, certainly in the longer term. It would involve the adoption of a treaty on mutual assistance between States parties to the Statute, which could be an annex or protocol to the Statute. It is not the purpose of this Report to deal with the detailed content or such a treaty. However, some comments may be made on the issues that would have to be faced in drawing up such a treaty.

539. In the first place, the treaty would identify the matters in respect of which assistance could be sought. For example, it could provide as follows:

> Assistance shall include, but not be limited to:
>
> (a) ascertaining the whereabouts and addresses of persons;
>
> (b) taking the testimony or statements of persons in the requested State or at the Court;
>
> (c) effecting the production or preservation of judicial and other documents, records, or articles of evidence;
>
> (d) service of judicial and administrative documents;
>
> (e) authentication of documents.

540. But the utility of such a treaty or protocol would be primarily that it dealt with the limitations on the giving of assistance, and in particular that it would limit the possible excuses for not giving assistance. For example, there is usually a provision in mutual assistance treaties on their non-applicability to military offences and, sometimes, political offences. Such a provision would be obviously inappropriate in the present context.

541. The most difficult issue would be to identify the circumstances in which requests can be refused by the requested State, in other words, the circumstances in which the requested State would have a discretion as to the grant of the assistance.

542. In normal bilateral mutual assistance treaties, the grounds on which a requested State may deny a request include (a) when the person to whom the request relates has already been convicted or acquitted by a final judgment of a court in the requested State, and (b) when it considers that the execution of the request is likely to prejudice its sovereignty, security or similar essential interests. No doubt the former provision might be appropriate (although the *non bis in idem* provision in the Statute should be drafted in such a way that the problem would not arise). But having regard to the purposes and potential jurisdiction proposed for a court, the latter provision is less appropriate. If some "safety-valve" is required allowing a refusal of judicial assistance, it should be on much more limited grounds (e.g. on the basis of the security of the State concerned).

543. Mutual assistance treaties quite often include other matters in respect of which a requested State reserves the right not to grant assistance. It would, however, be necessary to confine such matters to a minimum.

544. Other provisions in the treaty could relate to:

(a) the identification of a central authority in the requested State and of an officer of the court (presumably the Registry or a prosecutor) to whom and by whom requests for assistance would be made;

(b) the execution of the request for assistance, and the law governing execution. Generally speaking, that law would be the law of the requested State, since it will be necessary for various steps, including legal steps, to be taken by the authorities of that State. However the treaty or protocol could provide a particular method for executing the request, which would become part of the law of the requested State by reason of its accession to the Statute or by legislative implementation of the Statute;

(c) the contents of the request;

(d) the circumstances in which a person who is in custody in the requested State may appear as a witness at the court;

(e) costs;

(f) confidentiality of information in the request and of information provided pursuant to the request;

(g) whether there should be rules governing the compelling of testimony in either the requested State or in the court, i.e. whether a witness would be obliged to give testimony which he or she would have a right under the law of the requested State or the court to refuse to give. Of course proceedings in the court would comply with the guarantee against self-incrimination in article 14(3)(g) of the International Covenant on Civil and Political Rights, so that problems of this kind would be reduced, if not eliminated;

(h) the language in which requests are to be made;

(i) safe conduct or immunity from prosecution of persons who, pursuant to the treaty, give testimony before the court pursuant to the treaty.

545. In relation to some of these matters (e.g. items (d), (f) and (i) in the above paragraph) there will need to be a concordance between the provisions in the treaty or protocol and the arrangements for the court to be located in a host country. Thus it may be that the best option for international judicial assistance, in the first phase of the court's existence, would be the second option discussed (see paras. 536 and 537 above), on the basis that the third option could be dealt with once the administrative arrangements for the court had been concluded and implemented.

(e) Implementation of sentences

546. The central issue here is who will be responsible for the monitoring and implementation of sentences. In principle, the monitoring authority should be the court. However, there is a difficulty with that choice if the court is not a standing body, and arrangements would need to be made, perhaps in rules made under the Statute, for applications to the court to be made to vary the conditions of punishment (e.g. to grant parole or compassionate release in appropriate circumstances). But in any event the Statute would no doubt provide that States parties should do their utmost to assist the court in the implementation of sentences, including in the pursuit of the assets of crime which were the subject of confiscation.

547. The most common form of sentence will be imprisonment, and this raises the question of the place where sentence of imprisonment will be served. The most obvious solution would be for sentences to be served in the penal institutions of the complaining State, under conditions not less favourable to the prisoner than those provided in the United Nations Minimum Standard Rules for the Treatment of Prisoners.

548. It may be that smaller States will be concerned that such a provision would simply postpone to the stage of implementation of sentences the very problems which have led them to call for an international criminal court in the first place. Other alternatives would be for sentences to be served in the penal institutions of another State party, or in a facility of the host State made available for the purpose. But the idea of establishing a specifically international prison facility is objectionable on the ground that it would be too costly and would not be justified by the number of prisoners.

549. Another issue is whether, even if the court does not have its own prison facility, it should maintain some staff to supervise the implementation of sentences - a form of international control commission, which might be a very small entity. An alternative would be for the entire implementation of sentences to be assigned to a particular State, such as the State which has initiated proceedings before the court. Again, however, certain States support an international criminal court out of a desire to distance themselves from the offence, the offender or the trial proceedings, and it may be doubtful whether they would accept such an approach.

(f) Relationship of a court to the existing extradition system

550. The issues raised under this heading relate to the right of States party to extradition treaties which adopt the *aut dedere aut judicare* approach, to demand extradition and, in the alternative, to have the accused submitted to its competent authorities for prosecution. To take an example, article 7 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation provides:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.

551. This provision has to be read with article 5, which provides that each State party must...

> take such measures as may be necessary to establish its jurisdiction over [the offence in question]... in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8...

552. Two issues arise with respect to such provisions: first, what is their relationship to the jurisdiction of the suggested international criminal court; secondly, how should multiple extradition requests be dealt with.

553. According to the approach taken in this Report, an international criminal court would be complementary to the existing system of national courts. As between States parties to the Statute of a court, the system for handing over accused persons could be made complementary to the existing prosecute or extradite regime. That is to say, States parties which had accepted the jurisdiction of the court with respect to a given offence would accept that the court was a valid third alternative to extradition or prosecution before its own courts. The Statute could go further, and provide that a State which had accepted the jurisdiction of the court with respect to an offence is obliged to hand over an accused person to the court, at the request of another State party which had accepted the same obligation. Unless the General Assembly were to indicate a contrary preference, the Working Group would be inclined to recommend such a provision.

554. On the other hand it seems clear that States parties to the Statute which have not accepted the jurisdiction of an international court with respect to an offence could not compel trial in the court, and it may be that with respect to such States the existing extradition arrangements should be left to operate in accordance with their terms. Certainly this must be the position with States not parties to the Statute. Thus such States would remain free to insist on the application of the prosecute or extradite regime as at present, although they would retain the option of consenting ad hoc to the jurisdiction of the international court in the particular case. To avoid difficulty, it should be provided that such consent needs to be given expressly and in writing.

555. In the event of multiple requests from States, including from States which have accepted the jurisdiction of an international court, or from the court itself, the requested State would presumably remain free, as at present, to choose which request to accept. However, it would be possible to modify this position, so far as States party to the Statute are concerned.

556. For example, consideration should be given to the provision of non-binding guidelines to assist requested States in choosing among multiple

and conflicting requests. 119/ Such guidelines would not impose obligations on the requested State. But in addition to any intrinsic usefulness, they could provide support for a State acting in accordance with them *vis-à-vis* a State with other priorities.

557. It is not necessary to explore in detail the content of such guidelines at this stage, except to say that a State party to the Statute should at least be under an obligation to give "special consideration" to trial in the international court at the request of another State party.

119/ Cf. art. 6 (2) of the draft Code of Crimes, as provisionally adopted, which provides that "special consideration" should be given, in the case of multiple requests, to the State in whose territory the offence was committed. That provision does not of course regulate priorities *vis-à-vis* a request for delivery for trial by an international criminal court: cf. art. 6 (3).

APPENDIX

Table of Selected Proposals for Prosecution/Complaints Mechanism of an International Criminal Court

(1) ILA Draft Statute of the International Penal Court (1926)

States parties only may be prosecutors (art. 24). The leave of the Court is required for service of a charge, with the Court having power to dismiss cases of an unsubstantial character, etc. (art. 25).

(2) International Association for Penal Law, Draft Statute for the Creation of a Penal Chamber of the International Court of Justice (1928/1946)

The Draft Statute provides for a preliminary inquiry by selected judges of the court (arts. 16-17); proceedings may be commenced by the Security Council, or by a State acting under the authority of the Security Council (art. 20). Only States may bring a complaint to the Security Council (arts. 21-22). The Security Council can appoint its own prosecutor or leave the presentation of the case to the State concerned (art. 25).

(3) Convention for the Creation of an International Criminal Court, Geneva, 16 November 1937

States parties are entitled to commit an accused to trial before the ICC rather than their own courts (art. 2). The committing State is to conduct the prosecution unless the victim State or, failing that, the State where the crime was committed elects to prosecute (art. 25 (3)). Provision is made for intervention by any State entitled to seize the Court (art. 26).

(4) London International Assembly, Draft Convention for the Creation of an International Criminal Court, 1943

States parties are entitled to commit an accused to trial before the ICC rather than their own courts (art. 4 (1)). A State party which is or whose national is the victim of a war crime may request the ICC prosecuting authority to summon the accused (art. 4 (2)). That authority is the United Nations Procurator General, chosen by the Court (art. 21 (1)); the Procurator General may be assisted in respect of specific cases by an officer appointed by the State party concerned (art. 21 (3)). The Procurator General's functions include the power to commence prosecutions "on his own authority" (art. 22 (1) (f)). In the case of an accused committed to trial at the request of a State party under art. 4 (2), there is a form of committal proceeding before the ICC (art. 31), in which the Procurator General participates and gives advice (art. 31 (4)). Thereafter the prosecution is conducted by the Procurator General (art. 31 (6)). States have rights of intervention, including participation in oral proceedings (art. 32).

(5) France, Draft Proposal for the Establishment of an International Criminal Court (A/AC.10/21) (1947)

The French Draft envisaged, for State crimes, a prosecutor (parquet) responsible for instituting proceedings, in liaison with the Security Council, although with some (undefined) power of initiative left to States parties also. For crimes other than State crimes, the system of the 1937 Convention was suggested.

(6) United Nations Secretary-General, Draft Convention on the Crime of Genocide (E/447) (1947)

Annex 1. Establishment of a Permanent International Criminal Court for the Punishment of Acts of Genocide
This is largely based on the 1937 Convention. A State may request the trial for genocide of an individual in its custody (art. 2(1)); either ECOSOC or the Security Council is to decide on committal and to designate a prosecutor or prosecutors (art. 2(3)). ECOSOC or the Security Council may discontinue the prosecution (art. 25).
Annex 2. Establishment of an ad hoc International Criminal Court for the Punishment of Acts of Genocide
The prosecution system is essentially the same as under Annex 1.

(7) France, Draft Convention on Genocide submitted to the Sixth Committee of the General Assembly (A/C.6/211) (1948)

Under the Draft, the ICC includes an International Prosecutor's Office (art. 5), the composition of which is defined in an Annex. Indictments are addressed to that Office, which after inquiry may commence proceedings before one or more judge-rapporteurs (art. 6).

(8) United Nations Committee on International Criminal Jurisdiction, Report and Revised Statute for an International Criminal Court (1953)

The Committee rejected the right of the General Assembly or other international organizations to commence proceedings. It discussed (without agreeing on) a system of political screening of cases (paras. 110-113). It proposed a preliminary investigation procedure before some members of Court (on the Belgian model) (para. 120). The accused would have the right to be heard at the preliminary investigation, but not to present evidence (para. 121). The preliminary investigations chamber would have the power to order further inquiries (para. 122). A Belgian proposal enabling the complainant State to appoint a prosecutor was narrowly adopted (paras. 123-5). It should be noted that all proposals were tentative: the Committee "did not wish to give its proposals any appearance of finality" (para. 154). In the Committee's Revised draft statute for an international criminal court, article 29 dealt with access to the Court (and contained alternative provisions relating to political screening). Article 33 dealt with the Committing Chamber, article 34 with the role of Prosecuting Attorney. Article 43 empowered the Court to decide on application by the Prosecuting Attorney on the withdrawal of prosecutions.

(9) Foundation for the Establishment of an International Criminal Court and International Criminal Law Commission, Draft Statute for an International Criminal Court (Bellagio/Wingspread, 1972)

Under the Draft Statute, article 16, both a Procurator and the Prosecution were created. It would be the duty of the Prosecution to initiate proceedings etc., subject to the administrative supervision of the Procurator (art. 28). The Procurator would present cases to the ICC, after they had been certified for trial by the Commission of Inquiry (art. 29). Before certifying a case for trial, the Commission of Inquiry would first conduct a full preliminary hearing (art. 30). Withdrawal of prosecution required the consent of the ICC (art. 39).

(10) United Nations Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other International Crimes E/CN.4/1426 (1981)

Under the Draft Convention the Tribunal itself was responsible for prosecution (art. 5(1)). Complaints were to be made to or initiated by the Procuracy (art. 8 (1)). Its Investigative Division would determine whether a complaint was "manifestly unfounded" (art. 8 (2)), but no complaint by a State party or a United Nations organ could be deemed manifestly unfounded (art. 8 (3)). Another State or intergovernmental organization could appeal to the Court against a finding that a complaint was manifestly unfounded (art. 8 (3)). If it was decided that the case should proceed, a "prosecutorial Division" would assume responsibility. A Procurator would submit the case to the Court; but the complainant State party or the relevant United Nations organ had certain independent rights in case of delay (art. 8 (6)). The Draft Convention provided for the office of Procurator (to be elected by States parties) (art. 15).

(11) ILA, Draft Statute for an International Criminal Court (Paris, 1984)

The Draft Statute provided for proceedings to be commenced by an International Commission of Criminal Inquiry, on the complaint of a State party which had conferred jurisdiction on the court (art. 24). It established the offices of Public prosecutor (art. 25) and Deputy Public prosecutors (art. 26). Under article 27, the International Commission of Criminal Inquiry would conduct a preliminary examination, before deciding whether to commence a prosecution (art. 31).

(12) Committee of Experts on International Criminal Policy, Revised Draft Statute for the Creation of an International Criminal Court (8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990)

Article 4 established a Procuracy, headed by a Procurator. Under article 13, a complaint was to be made to or initiated by Procuracy; its Investigative Division would then determine whether the complaint was "manifestly unfounded" (art. 13 (2)), but no complaint by a State party or a United Nations organ could be deemed manifestly unfounded (art. 13 (3)).

Another State or intergovernmental organization could appeal a finding that a complaint was manifestly unfounded (art. 13 (3)). If the case proceeded, the Procurator would submit the case to the Court; but the complainant State party or relevant United Nations organ would have certain independent rights in case of delay (art. 13 (6)). Under article 19, a pre-trial investigation would then take place before a Chamber of the Court. The Procurator was to be elected by States parties (art. 25).

كيفية الحصول على منشورات الأمم المتحدة

يمكن الحصول على منشورات الأمم المتحدة من المكتبات ودور التوزيع في جميع أنحاء العالم . استعلم عنها من المكتبة التي تتعامل معها أو اكتب إلى : الأمم المتحدة ، قسم البيع في نيويورك أو في جنيف .

如何购取联合国出版物

联合国出版物在全世界各地的书店和经售处均有发售。请向书店询问或写信到纽约或日内瓦的联合国销售组。

HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à : Nations Unies, Section des ventes, New York ou Genève.

КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу: Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

COMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.

Litho in United Nations, New York ISSN 0082-822X 41603—September 1992—3,385

▽